

ONTARIO BAR ASSOCIATION

**Not-for-Profit and Charitable Organizations in the Health Sector:
Evolving Governance & Compliance Issues**

**WORKING WITH THE CANADA NOT-FOR-PROFIT CORPORATIONS ACT:
INCORPORATION AND CONTINUANCE**

April 8, 2013

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A. INTRODUCTION

It has been a year and a half since the coming into force of the *Canada Not-for-profit Corporations Act*¹ (“CNCA”) on October 17, 2011. All federal incorporation of non-share capital corporations must do so under the CNCA.² As well, all non-share capital corporations incorporated under Part II of the *Canada Corporations Act*³ (“CCA”) have three years, until October 17, 2014, to continue under the CNCA. These corporations are required to continue under the CNCA by completing a continuance process. Failure to continue within this time frame will result in dissolution of the corporation.⁴ While many CCA Part II corporations have taken steps to continue under the CNCA, the vast majority of them have not yet done so. Up to March 12, 2013, only 763 of approximately 17,000 corporations had continued under the CNCA.

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¹ S.C. 2009, c. 23.

² *Ibid.*, section 298.

³ R.S.C., 1970, c. C-32.

⁴ *Supra* note 1, section 297(5). It states that for any CCA Part II corporation that does not apply for a certificate of continuance to be continued under the CNCA within 3 years after the coming into force of the CNCA, the Director may dissolve the corporation under section 222 of the CNCA. Transitional provisions of the CNCA (sections 297 and 298) are not contained in the version of the CNCA posted on the Department of Justice’s website. Rather, they are contained in the Royal Assent version of the CNCA available on the Parliament of Canada website at <<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=4015127&Language=E&Mode=1&File=134>>.

Part II of the CCA governs the incorporation and governance of federal non-share capital corporations. This framework has remained essentially unchanged since 1917.⁵ The CCA sets out very few rules on corporate governance, and corporations are required to comply with Corporations Canada’s policy statements on these matters. After various attempts of corporate reform,⁶ the CNCA was finally enacted by Parliament and received Royal Assent on June 23, 2009, and was eventually proclaimed into force on October 17, 2011. The CNCA is modelled after the *Canada Business Corporations Act*⁷ (“CBCA”) and provides a very detailed set of rules for the governance of federal not-for-profit (“NFP”) corporations.

This paper reviews essential concepts of the new rules under the CNCA, the steps involved in incorporating under the CNCA, the steps involved in the process for CCA Part II corporations to continue under the CNCA, as well as relevant issues to consider when drafting articles (both articles of incorporation and articles of continuance) and by-laws that comply with the CNCA.

B. OVERVIEW OF INCORPORATION PROCESS

Under the CNCA, incorporation is “as of right”, similar to the mechanism used in the CBCA. One or more individuals or corporations may incorporate an NFP corporation by filing articles of incorporation.⁸ Upon receipt of the articles of incorporation, a certificate of incorporation will be issued.⁹ Incorporation as of right is a welcome development compared to the system under the CCA. Under the CCA, incorporation is subject to the discretion of the Minister. The ability to incorporate as of right and to file articles of incorporation electronically means that incorporation under the CNCA is now much faster.

Under the CCA, corporations must set out their objects in the letters patent. Under the CNCA, NFP corporations must set out a statement of the purpose of the corporation, any restrictions on

⁵ Historically, NFP corporations were incorporated by Special Acts of Parliament until the enactment of the *Companies Act Amending Act, 1917*, which later became the CCA in 1964-1965. The legislation has remained largely unchanged with respect to NFP corporations since 1917.

⁶ The CNCA is the result of several similar attempts at legislative reform, including Bill C-21, which died on the Order Paper November 29, 2005 when the 38th Parliament dissolved. In 2008, both Bill C-62 and Bill C-4 suffered the same fate.

⁷ R.S.C., 1985, c. C-44.

⁸ *Supra* note 1, section 6(1).

⁹ *Ibid.*, sections 8 and 9.

the activities that the corporation may carry on, and a statement concerning the distribution of property remaining on liquidation after the discharge of any liabilities of the corporation.¹⁰

Under the CNCA, NFP corporations have the capacity, rights, powers and privileges of a natural person.¹¹ The doctrine of *ultra vires* no longer applies to NFP corporations. The CNCA also provides that a corporation may carry on activities throughout Canada, but its capacity to carry on its activities, conduct its affairs and exercise its powers outside Canada is limited to the extent that the laws of that jurisdiction permit.¹² The CNCA also provides that a corporation shall not carry on any activities or exercise any power in a manner contrary to its articles, but no act of a corporation is invalid by reason only that the act or transfer is contrary to its articles or the CNCA.¹³

Details regarding the information to be included in the articles are reviewed later in this paper.

An initial notice of registered officers and first directors must also be filed with the articles. The individuals listed on the form will act as directors of the corporation from the date of the certificate of incorporation until the first meeting of members.¹⁴

After incorporation, the CNCA requires the incorporator(s) or director(s) to call an organizational meeting of the directors to organize the corporation by adopting a number of resolutions so that the corporation would be ready to conduct activities.¹⁵ A minimum of 5 days' notice of this meeting is required to be given to each director listed in the initial notice. At this meeting, the directors may: make by-laws; adopt forms for corporate records and debt obligation certificates; authorize the issue of debt obligations; appoint officers; appoint an interim public accountant to hold office until the first meeting of members; issue memberships; make banking arrangements; and transact other business.¹⁶ Alternatively, instead of holding a first meeting of

¹⁰ *Ibid.*, section 7(1).

¹¹ *Ibid.*, section 16.

¹² *Ibid.*

¹³ *Ibid.*, section 17.

¹⁴ *Ibid.*, section 128.

¹⁵ *Ibid.*, section 127.

¹⁶ *Ibid.*, section 127(1).

the directors, it is possible for the directors to sign organizing resolutions to deal with all of the above matters. This is especially suitable if the number of directors is small.¹⁷

After the organizational meeting of the first directors, an organizational meeting of the members will then need to be held. Although most of the corporation's initial organizing business can be dealt with by the directors at the directors' first meeting, certain matters may not be decided by the directors or may require confirmation by the members. The first directors must call the first members' meeting within 18 months of the corporation's date of incorporation.¹⁸ This meeting is usually held immediately after the first organizational meeting of the directors. Similar to the first meeting of the directors, the members may also adopt these initial resolutions by written resolutions instead of holding a members' meeting, provided the written resolutions are signed by all members.¹⁹

Corporations Canada's website provides a lot of helpful information about the CNCA, including a general overview on how to operate under the CNCA, model by-laws, by-law builder, as well as all of the forms under the CNCA.²⁰

C. OVERVIEW OF CONTINUANCE PROCESS

The CNCA does not automatically apply to existing CCA Part II corporations. These corporations must apply for continuance by October 17, 2014. However, the CCA does not permit CCA Part II corporations to be exported and continued under another statute or legislation. There is therefore no mechanism under the CCA to allow them to be continued under the CNCA. This gap is remedied by the transitional provisions in the CNCA, which requires CCA Part II corporations to apply for a certificate of continuance under section 211 of the CNCA,²¹ and subsections 212(3) and 212(7) of the CNCA which provide CCA corporations with two mechanisms to approve the continuance process.

¹⁷ *Ibid.*, section 127(5).

¹⁸ *Ibid.*, section 160 and Section 61(1) of the Regulations.

¹⁹ *Ibid.*, section 166.

²⁰ Corporations Canada, online: https://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/h_cs04953.html.

²¹ *Supra* note 1, section 297(1).

The continuance process involves applying for a certificate of continuance by filing articles of continuance and an initial notice of registered officers and directors. Corporations should also prepare and adopt new by-laws that comply with the CNCA.

Because the rules under the CNCA are very different from the rules under the CCA, information that needs to be set out in the articles and by-laws are also different from what are currently set out in their letters patent, supplementary letters patent and by-laws. This difference means that the continuance process is not simply a matter of transposing the provisions of the letters patent and supplementary letters patent into the articles and using the same by-laws.

The following is an overview of the steps required for the continuance process:

1. In preparation for a smooth continuance into the CNCA, a corporation should begin by collecting and reviewing all of its governing documents. The next step is for the corporation to gain a clear understanding of the rules contained in the CNCA so as to determine how these new rules impact the governance of the corporation and what provisions to include in the articles of continuance and new by-laws. Examples of questions to consider include: whether the current by-laws or the desired governance structure and process are inconsistent with CNCA requirements. If so, the corporation should consider how its governance structure and process would need to be revised in order to comply with the CNCA requirements.
2. A corporation should also decide when to start the by-law review process. Key considerations in determining when to begin the process include the length of time and complexity of the process required in revising the by-laws; whether the by-laws will require substantive changes; the size of membership and time required to consult members; the board structure; whether changes to membership structure are required; and whether changes of corporate objects are required.
3. Articles of continuance and new by-laws should be prepared. The articles need approval from at least a two-thirds resolution of the members and must be filed with Corporations Canada. Upon issuance of the certificate of continuance, the articles and the certificate

replace the letters patent and any supplementary letters patent. Corporations Canada's approval is no longer necessary for by-laws to take effect; however, a corporation must still file its by-laws with Corporations Canada within twelve months of adoption by its members.

4. Registered charities must also file their articles of continuance, certificate of continuance and new by-laws with Canada Revenue Agency ("CRA"). Additionally, charities in Ontario need to file their articles of continuance and certificate of continuance with the Ontario Public Guardian and Trustee, which oversees charities in Ontario. Other applicable filings and records should also be updated.

The above steps are explained in more detail later in this paper.

Prior to applying for continuance, the CCA continues to apply to CCA Part II corporations. As such, until a CCA corporation has continued under the CNCA, it can continue to apply for supplementary letters patent and approval of by-law amendments under the CCA. Upon the issuance of the certificate of continuance, the CCA will cease to apply to them.

Corporations Canada's website provides a helpful transition guide on the continuance process.²² As well, information on the incorporation process is also helpful in relation to continuance, such as the general description on how to operate under the CNCA, the model by-laws and by-law builder.

D. KEY FEATURES OF THE CNCA

Many of the rules of the CNCA are similar to those contained in the CBCA and are familiar to lawyers who work with the CBCA. However, these rules are unfamiliar to the NFP sector. Having a clear understanding of the rules contained in the CNCA and how these rules impact the governance of a corporation is essential in the preparation of the articles (incorporation/continuance) and in preparing the by-laws. In the case of the continuance process for CCA Part II corporations, such an understanding is even more important because these rules are very different from the rules that they had to work with under the CCA.

²² Corporations Canada, online: https://www.ic.gc.ca/eic/site/cd-dgc.nsf/eng/h_cs04954.html.

1. Relationship between the CNCA, regulations, articles and by-laws

At the outset, it is necessary to understand the framework of the CNCA. When reviewing the CNCA, many provisions make reference to certain requirements being “prescribed.” The prescribed requirements are set out in the regulations to the CNCA. Other provisions of the CNCA also make reference to certain requirements being set out in the regulations. At this time, only one set of regulations has been released by Corporations Canada. In the future, more regulations will be made.

The CNCA contains many mandatory rules that apply to NFP corporations which cannot be overridden by including provisions in a corporation’s articles, by-laws or unanimous member agreement. For example, NFP corporations must be membership organizations with both members and directors; *ex officio* directors are not permitted;²³ it is not permissible to require the removal of directors be subject to a higher approval than an ordinary resolution.²⁴

The CNCA also contains a set of default rules, which would apply to NFP corporations if their articles, by-laws and/or unanimous member agreement are silent on those issues. It is possible to override the default rules, but the overriding provisions must be set out in the document(s) specified by the CNCA:²⁵

(a) Articles only – For example:

- ◆ the articles can provide for classes of members with different voting rights rather than the default rule of one member one vote;²⁶
- ◆ the articles can permit other classes of members to cancel a particular class of members without the approval of the class of members being cancelled;²⁷

²³ *Supra* note 1, section 128.

²⁴ *Ibid.*, section 7(5).

²⁵ A useful table of the default rules in the CNCA and how they may be overridden is contained in Appendix A of a paper by Jane Burke-Robertson & Linda J. Godel, “Here Comes the CNCA: Are You Ready to Advise Your Clients?” (Paper delivered at the CBA’s and OBA’s 2011 National Charity Symposium, Toronto, 6 May 2011) online: Carters Professional Corporation <<http://www.carters.ca/pub/article/charity/2011/jbrlg0506.pdf>>.

²⁶ *Supra* note 1, section 154(5).

²⁷ *Ibid.*, section 199(1)(a).

- ◆ the articles can permit the creation of new classes of members with equal or superior rights to an affected class without the approval of the affected class;²⁸
- ◆ the articles may permit the board to appoint additional directors to hold office until the end of the next annual meeting of members, provided that the number of such appointed directors does not exceed one third of the directors elected at the previous annual meeting of members;²⁹

(b) By-laws only – For example:

- ◆ by-laws can provide for other modes of transferability of membership, rather than the default rule of transferring membership back to the corporation;³⁰
- ◆ the by-laws can prohibit or restrict members’ electronic participation at members’ meetings, rather than the default rule that permits it;³¹

(c) Articles or by-laws – For example:

- ◆ the articles or by-laws may provide other mechanisms to override the default rule requiring the rights of a member ceases upon termination of membership;³²
- ◆ the articles or by-laws may provide for another mechanism to override the default rule that directors may meet at any place.;³³

(d) Articles or unanimous member agreement – For example:

- ◆ the articles or unanimous member agreement can restrict the responsibility of the board for managing or supervising the management of a corporation;³⁴
- ◆ the articles or unanimous member agreement can require a greater number of votes of directors or members than are required by the CNCA to effect any

²⁸ *Ibid.*, section 199(1)(e),

²⁹ *Ibid.*, section 128(8).

³⁰ *Ibid.*, section 154(8).

³¹ *Ibid.*, section 159(4).

³² *Ibid.*, section 157.

³³ *Ibid.*, section 136(1).

³⁴ *Ibid.*, section 124.

action (other than to require the removal of directors be subject to approval higher than an ordinary resolution);³⁵ or

(e) Articles or by-laws or unanimous member agreement – For example:

- ♦ the articles, by-laws or unanimous member agreement can restrict the power of the board to borrow funds without members approval;³⁶
- ♦ the articles, by-laws or unanimous member agreement can provide for another mechanism to override the default rule that directors can designate, appoint and specify the duties of officers.³⁷

Where it is possible to override the default rules, some of the overriding provisions are limited to certain choices (alternate rules) that are set out in the regulations. For example:

- to override the default rule that members cannot have absentee voting, the by-laws can permit absentee voting by choosing one or more of the three methods prescribed in the regulations, namely (a) proxy, (b) mailed-in ballots and (c) telephonic, electronic or other communication facility;³⁸ and
- the by-laws may provide for a different quorum for a meeting of members to override the default rule of a majority, but the quorum must be set out in the manner as prescribed in the regulations, namely a fixed number, a percentage of members, or a number or percentage to be determined by a formula.³⁹

Therefore, where it is desirable to override the default rules in the CNCA, it is necessary to insert the appropriate provisions in the articles, by-laws and/or unanimous member agreement. Where the CNCA requires certain provisions to be included in the by-laws, those provisions may be included in the articles instead, and the CNCA requirement that those provisions are to be set out in the by-laws will be deemed met.⁴⁰

³⁵ *Ibid.*, section 7(4).

³⁶ *Ibid.*, section 28(1).

³⁷ *Ibid.*, section 142(a).

³⁸ *Ibid.*, section 171.

³⁹ *Ibid.*, section 164.

⁴⁰ *Ibid.*, section 7(3.1).

The members of soliciting corporations (as explained below), however, are not permitted to enter into unanimous member agreements and their options to override default rules are limited to including appropriate provisions in the articles or the by-laws.⁴¹

It is important to understand that it is necessary to work with at least four or five documents in order to have a complete picture of what rules apply to a corporation: namely the CNCA, the regulations made under the CNCA, the articles, the by-laws, as well as any unanimous member agreements in the case of a non-soliciting corporation.

It is therefore necessary for the incorporators (or a CCA corporation in the case of a continuance) to review and determine, at the outset, which default rules are to be accepted or overridden, and whether the appropriate overriding provision would need to be included in the articles or by-laws (or unanimous member agreement in the case of a non-soliciting corporation as explained below).

2. Types of Corporations and Financial Review

Under the CNCA, corporations are categorized into one of two categories: soliciting corporations and non-soliciting corporations. The concept of soliciting corporations and non-soliciting corporations is one of the key concepts contained in the CNCA. Depending on whether a corporation is soliciting or non-soliciting, the distinction will affect its governance structure, *e.g.*, the size of the board and the dissolution clause to be included in the articles, the composition of the board to be set out in the by-laws, whether a unanimous member agreement may be utilized and what provisions are to be included in the agreement, and whether financial statements will need to be filed with Corporations Canada. As such, it is essential to determine the categorization of the corporation early in the process of incorporation/continuance.

A soliciting corporation is defined in section 2(5.1) of the CNCA, with the relevant time periods and prescribed monetary amounts set out in section 16 of the regulations. A corporation becomes a soliciting corporation if, in a fiscal year, the corporation receives more than \$10,000 in gross annual revenue, directly or indirectly, from public sources, namely:

⁴¹ *Ibid.*, section 170(1).

(a) requests for donations or gifts from a person who does not fall into any of the following categories:

- members, directors, officers, or employees of the corporation at the time of the request for donation or gifts;
- legal or common law spouse of the above list of persons; or
- children, parents, brothers, sisters, grandparents, uncles, aunts, nephews or nieces of the above list of persons;

(b) grants or other similar financial assistance received from the federal or a provincial or a municipal government, or agencies of such government; or

(c) donations or gifts received from a soliciting corporation.

A corporation that does not meet the definition for a soliciting corporation is a non-soliciting corporation.

The determination of whether a corporation is soliciting or not is based on the annual gross income as of the fiscal year-end. If a corporation has income in excess of \$10,000 in a fiscal year from a public source, then it would become a soliciting corporation, but the commencement date for soliciting corporation status would only take effect at its next annual meeting of members. The soliciting status would continue for three years and end as of the third annual meeting of members that follows. If the corporation receives public money in a future fiscal year, then the three year time period for being a soliciting corporation would start again. If the corporation does not receive public funds during the three year period, then it would not affect the three year soliciting corporation status. The reason why the soliciting corporation status commences and ends at annual meetings of members is because this status affects the composition of the board (as explained below), and this period will give the corporation an opportunity to elect the suitable number of directors at the annual meeting of members at the time when it becomes a soliciting corporation.

If a corporation is a soliciting corporation, then it is required to comply with the following rules:

First, it must have at least three directors (as opposed to non-soliciting corporations, which are only required to have a minimum of one director), and at least two of the directors must not be officers or employees of the corporation or any of its affiliates.⁴² This requirement therefore affects the size of the board to be included in the articles.

Furthermore, this requirement affects the composition of the board to be set out in the new by-laws. The term “officer” is defined in the CNCA to mean a person “appointed as an officer under section 142, the chairperson of the board of directors, the president, a vice-president, the secretary, the treasurer, the comptroller, the general counsel, the general manager or a managing director of a corporation, or any other individual who performs functions for a corporation similar to those normally performed by an individual occupying any of those offices.”

For soliciting corporations that are also registered charities in common law jurisdictions, it would not be a problem for them to meet the requirement that at least two directors must not be employees of the corporation. This is because at common law, persons receiving remuneration directly or indirectly from a charity are prohibited from being directors on the board of the charity.⁴³ However, corporations that are not registered charities and do have paid employees sitting on their boards will need to arrange their governance structures accordingly and consider what provisions are to be included in the by-laws. In the context of continuance for CCA Part II corporations, compliance with this requirement may require revising their board structure.

⁴² *Ibid.*, section 125.

⁴³ Ontario follows the common law rule on the issue of remuneration of directors. At common law, directors of a charity are considered to be quasi-trustees for purposes of managing and investing the charitable property of a charity. They are prohibited at common law from receiving any direct or indirect benefit from the charity. As a result, charities cannot pay members of their boards any form of remuneration for services rendered without court approval, even if the services may be provided at a reasonable rate or below market cost. This is because directors of charities are considered to have trustee-like fiduciary obligations placed on them in relation to charitable property and, as a result, it is a conflict of interest, as well as a breach of trust for a charity to pay any monies of the charity to any director as remuneration for any services rendered by the director to the charity, whether it is in his/her capacity as a director or for other services provided to the charity. This prohibition, however, does not prevent directors/trustees from being reimbursed their reasonable out-of-pocket expenses. See for example: *Re French Protestant Hospital*, [1951] Ch. 567; *Ontario (Public Guardian and Trustee) v. AIDS Society for Children (Ontario)*, [2001] O.J. No. 2170 (Sup. Ct.J.); *Re Public Trustee and Toronto Humane Society* (1987), 40 D.L.R. (4th) 111 (Ont. H.Ct.J.); *Re David Feldman Charitable Foundation* (1987), 58 O.R. (2d) 626 (Surr. Ct.); *Ontario (Public Guardian and Trustee) v. National Society for Abused Women and Children*, [2002] O.J. No. 607 (Sup. Ct.J.); *McLennan v. Newton* (1927), [1928] 1 D.L.R. 189 (Man. C.A.).

For small organizations where volunteer directors also serve as officers, they often have a small board of a few directors, with each person taking on an officer position, such as president, secretary, treasurer. The new rule in the CNCA requires these corporations to carefully structure the size and composition of the board and who may be appointed to be officers of the corporation. For example, in the case of a board with three directors, this rule means that two of the three directors cannot be appointed officers, leaving only one director to be eligible to be appointed as an officer. In this case, either this director will have to take up more than one officer positions or officers will need to be appointed from outside the board.

The term “affiliate” is not defined in the CNCA. For corporations that have a relationship with a related entity, such as an operating charity and a parallel foundation of the charity, they might be caught off-side with the new rule if they have crossover directors, where the crossover director is a paid employee of the other corporation (such as the executive director of the parallel foundation having a seat on the operating charity), if the other corporation is an “affiliate” of the corporation.

Second, soliciting corporations (as well as registered charities even if they are non-soliciting corporations) are required to provide in their articles that any property remaining on liquidation after the discharge of any liabilities of the corporation shall be distributed to one or more qualified donees, as defined in subsection 248(1) of the *Income Tax Act*.⁴⁴ This provision is commonly referred to as the dissolution clause. This requirement applies regardless of whether the soliciting corporation is a registered charity or has other status under the *Income Tax Act*, e.g., non-profit organizations under paragraph 149(1)(l) of the *Income Tax Act*. This requirement should not be a problem for registered charities, since they are already subject to the same requirement under the *Income Tax Act*. However, soliciting corporations that are not registered charities would need to ensure that the required provision is inserted in the articles.

Third, members of a soliciting corporation are not permitted to enter into a unanimous member agreement.⁴⁵ All the members or the sole member of a non-soliciting corporation may enter into

⁴⁴ *Supra* note 1, sections 235(1)(b) and 235(2) of the CNCA. *Income Tax Act*, R.S.C., 1985, c.1 (5th Supp). However, pursuant to section 234 of the CNCA, if a person has transferred property to a corporation subject to the condition that it be returned on the dissolution of the corporation, the liquidator shall transfer that property to that person, and the property will not be subject to the distribution requirement set out in the dissolution clause.

⁴⁵ *Supra* note 1, section 170(1).

a unanimous member agreement to restrict the powers of the directors.⁴⁶ Therefore, if it was decided that a corporation is a soliciting corporation, then no consideration would need to be given regarding whether to prepare a unanimous member agreement. In that case, provisions that override default rules would need to be included in the articles or the by-laws, as appropriate. If it was decided that a corporation is not a soliciting corporation, then it would need to decide whether the members wish to enter into a unanimous member agreement. In addition, a decision would need to be made regarding whether provisions intended to override default rules should be included in the unanimous member agreement, as opposed to the articles or the by-laws.

Fourth, soliciting corporations are required to file their financial statements, the report of the public accountant, if any, and any further information respecting the financial position of the corporation and the results of its operations required by the articles, the by-laws or any unanimous member agreement with Corporations Canada annually.⁴⁷ This annual filing requirement does not apply to non-soliciting corporations, but Corporations Canada may require them to file.⁴⁸

Fifth, soliciting corporations are subject to higher requirements in terms of the appointment of a public accountant and level of review of their financial statements.⁴⁹ The CNCA contains rules regarding the qualifications of a public accountant under the CNCA. In this regard, a public accountant must meet all of the following requirements:⁵⁰

- is a member in good standing of an institute or association of accountants incorporated by or under a statute of the legislature of a province (*e.g.*, chartered accountant, certified general accountant or certified management accountant);⁵¹

⁴⁶ *Ibid.*, section 170.

⁴⁷ *Ibid.*, section 176(1). Specifically, a soliciting corporation must provide its annual financial statements to Corporations Canada not less than 21 days before the annual general meeting of members or without delay in the event that the corporation's members have signed a resolution instead of holding a meeting, approving the statements. In any event, a corporation must send financial statements to Corporations Canada within 15 months from the preceding annual meeting (by which time an annual meeting is required to be held under the CNCA or a resolution in writing signed in place of a meeting), but not later than 6 months after the end of the corporation's preceding financial year.

⁴⁸ *Ibid.*, section 177.

⁴⁹ *Ibid.*, Part 12. Specifically, sections 179, 181, 182, 188 and 189.

⁵⁰ *Ibid.*, section 180(1).

⁵¹ *Ibid.*, sections 188 to 191.

- meets any qualifications under an enactment of a province for performing any duty that the person is required to perform under the CNCA (e.g., a provincial licence to conduct audit or review engagements); and
- subject to an order of the court under section 180(6) of the CNCA, is independent of the corporation, its affiliates or the directors or officers of the corporation or its affiliates.⁵²

These requirements are usually not included in by-laws. However, some corporations may want to include these requirements in their by-laws to ensure compliance with the CNCA. Therefore, it is important that corporations are aware of these rules.

All soliciting corporations and non-soliciting corporations are further divided into designated corporations and non-designated corporations, depending on their income as follows:

- For soliciting corporations, a corporation receiving \$50,000 or less in gross annual revenues for its last fiscal year is a designated corporation, and a corporation receiving income in excess of this level is a non-designated corporation.⁵³
 - Members of a designated soliciting corporation are required to appoint a public accountant by ordinary resolution at each annual meeting.⁵⁴ In that case, the public accountant must conduct a review engagement of the financial statements, but the members may pass an ordinary resolution to require an audit instead.⁵⁵ It is possible for the members to waive the appointment of a public accountant annually by a unanimous resolution.⁵⁶ In that case, a compilation of the financial statements would be sufficient.

⁵² Under section 180(6) of the CNCA, an interested person may apply to the court for an order relieving a public accountant from meeting the qualifications described in section 180(1), if the court is satisfied that such an order would not unfairly prejudice the members of the corporation. The court may make such an order on such terms as it considers fit.

⁵³ *Supra* note 1, section 179.

⁵⁴ *Ibid.*, section 181.

⁵⁵ *Ibid.*, section 188.

⁵⁶ *Ibid.*, section 182.

- All non-designated soliciting corporations must appoint a public accountant. In terms of the level of review required, it will depend on the income of the corporation. Those corporations that receive more than \$50,000 and up to \$250,000 in gross annual revenues for the last fiscal year must have the public accountant conduct an audit, but their members can pass a special resolution to require a review engagement instead. Those corporations that receive more than \$250,000 in gross annual revenues for the last fiscal year must have the public accountant conduct an audit, and it is not permissible for their members to require a review engagement instead.⁵⁷
- For non-soliciting corporations, a corporation receiving \$1 million or less in gross annual revenues for its last fiscal year is a designated corporation and a corporation receiving income in excess of this level is a non-designated corporation.⁵⁸
 - Members of a designated non-soliciting corporation are required to appoint a public accountant by ordinary resolution at each annual meeting. In that case, the public accountant must conduct a review engagement of the financial statements, but the members may pass an ordinary resolution to require an audit instead. It is possible for the members to waive the appointment of a public accountant annually by a unanimous resolution. In that case, a compilation of the financial statements would be sufficient.
 - All non-designated non-soliciting corporations must appoint a public accountant. The public accountant must conduct an audit and it is not permissible for their members to require a review engagement instead.

The above rules are summarized in the table below:

⁵⁷ *Ibid.*, section 189.

⁵⁸ *Ibid.*, section 179.

Type of Corporation (Gross Annual Revenues)			Appointment of Public Accountant (PA)	Review Engagement or Audit
Soliciting	Designated	\$50,000 or less	Members must appoint a PA by ordinary resolution at each annual meeting. Exception – Members may waive appointment by annual unanimous resolution	PA must conduct review engagement, but members may pass an ordinary resolution to require an audit instead. (If no PA is appointed, then compilation only)
	Non-Designated	More than \$50,000 and up to \$250,000	Members must appoint a PA by ordinary resolution at each annual meeting	PA must conduct an audit, but members can pass a special resolution to require a review engagement instead
	Non-Designated	more than \$250,000	Members must appoint a PA by ordinary resolution at each annual meeting	PA must conduct an audit.
Non-Soliciting	Designated	\$1 million or less	Members must appoint a PA by ordinary resolution at each annual meeting. Exception – Members may waive appointment by annual unanimous resolution	PA must conduct review engagement, but members may pass an ordinary resolution to require an audit instead. (If no PA is appointed, then compilation only)
	Non-Designated	more than \$1 million	Members must appoint a PA by ordinary resolution at each annual meeting	PA must conduct an audit.

On the one hand, since the \$10,000 threshold for soliciting corporations is a very low threshold, it is possible that many, if not most, corporations would become soliciting corporations, and therefore their governance structure and corporate procedure would need to comply with the above requirements. On the other hand, for corporations that do not receive public funding at all, they would be non-soliciting corporations and their corporate documents would need to be drafted to reflect this state of affairs.

However, an important issue to keep in mind is that because the threshold is so low and is dependent on its revenue sources from year to year, it is possible that a corporation may move in and out of the soliciting corporation status from year to year. This oscillation might not be an issue for a corporation that does not have revenue from public sources, such as a membership recreational club that derives its revenues from membership dues and does not receive public donations or government funding. However, even in this scenario, the corporation may still

become a soliciting corporation for three years if, for example, it received a grant from a foundation (which receives public donations) for a special project.

As well, for small corporations that receive revenue from public sources that may be at the \$10,000 threshold level, it is possible that these corporations may move in and out of the soliciting corporation status from year to year. An example would be if the corporation received more than \$10,000 from public sources in year 1 and became a soliciting corporation at the annual meeting of members in year 2 and continues to have this status until the annual meeting of members in year 5. In this case, even if the corporation received less than \$10,000 in public funding in years 2 or 3, this reduced amount would not change its soliciting corporation status for those years. Whether or not the corporation will continue its soliciting corporation status at the end of the annual meeting of members in year 5 will depend on its income in year 4. If the corporation then received more than \$10,000 in year 4, then it will continue to be a soliciting corporation from the annual meeting of members in year 5 for another three years until the annual meeting of members in year 8.

When preparing incorporation or continuance documents for an NFP corporation, it is important to review the funding sources of the corporation to determine whether it will be a soliciting corporation all the time, a non-soliciting corporation all the time, or may move in and out of soliciting and non-soliciting corporation status. For an existing CCA Part II corporation preparing for continuance, it is necessary to review the past track record of funding sources, and future anticipated funding sources as well. If it was determined that the likelihood of moving in and out of soliciting corporation status is high, then it may be prudent to structure the board composition in compliance with the rules that apply to a soliciting corporation (*i.e.*, there are at least three directors and at least two of the directors are not officers or employees of the corporation or any of its affiliates) and to ensure that the members do not enter into a unanimous member agreement. Then, in the years when it was a soliciting corporation, it would then comply with the applicable financial reporting, appointment of public accountant and level review requirements, and *vice versa*.

3. Election and appointment of directors

An NFP corporation must have a board of directors. The general rule is that members must elect directors by ordinary resolution at annual members' meetings.⁵⁹ There are two exceptions to the general rule that the members must elect the directors. First, where there is a vacancy in the office of a director, the remaining directors may fill the vacancy so long as there is a quorum. If there is no quorum, the directors then in office must call a special meeting of members to fill the vacancy.⁶⁰ Second, the articles may include a provision allowing directors to appoint additional directors between annual meetings. In that case, the number of appointed directors must not exceed one third of the number of directors elected at the previous annual meeting. Directors appointed in this manner will hold office until the close of the next annual meeting of members.⁶¹ Note that the maximum number of directors to be appointed is not one third of the size of the board, but one third of the directors who were actually elected at the previous annual members' meeting. As such, in determining how many directors can be appointed by the board in this manner, consideration must be given to how many directors would be elected at each annual meeting, which in turn is affected by the length of the term of the directors and whether they have a stagger term.

The fundamental rule that directors must be elected by members in effect precludes *having ex officio* directors for NFP corporations. This preclusion is unfortunate, as the use of *ex officio* directors is a very commonly utilized mechanism in the NFP sector, such as an operating charity sending a representative to have a seat on the board of its parallel foundation. Therefore, these corporations would need to develop a workaround solution to this problem or cease the use of *ex officio* directors.

What is an acceptable workaround would depend on the governance structure of the NFP corporation in question. Where the existing *ex officio* is appointed by a person or a group of persons, a potential strategy would be to establish a special membership class for the person or group of persons in question, and the by-laws would permit this class of members to elect a director. However, the downside of this mechanism is that this class of members would have the right to have a separate class vote on certain fundamental matters, as explained below, and

⁵⁹ *Ibid.*, section 128(3).

⁶⁰ *Ibid.*, section 132.

⁶¹ *Ibid.*, section 128(8).

therefore would have a de facto class veto right on those matters. As an alternative to this mechanism, the by-laws may set out specific qualification requirements for certain seats on the board and that a consultation or nomination process involving a person or a group of persons is required for a person to be eligible for election to the board by the general membership.

Another potential strategy is for the articles to provide for the appointment of directors by the board as permitted by subsection 128(8), in which case, a policy could provide that only certain office holders would qualify for appointment. However, the downside of this strategy is that the appointment is subject to the board appointing the director in question and a mechanism would need to be put in place to address situations where the board refuses or delays to make the appointment.

A further strategy is not to include the desired persons on the board, but to provide them with rights to participate in board meetings (including the right to receive notice, attend and speak at meetings), except for the right to vote. However, this mechanism may not be suitable if it is essential that these persons must have a vote on the board.

4. Directors – number, change and term

Directors must be individuals that are least 18 years of age and are neither bankrupt nor have been declared incapable. There is no requirement that a director be a member of the corporation.⁶²

All corporations, except for soliciting corporations, must have a minimum of one director.⁶³ As mentioned above, soliciting corporations must have a minimum of three directors, and at least two of the directors must not be officers or employees of the corporation or its affiliates. The implications of this requirement on soliciting corporations that are also registered charities due to common law requirements have been explained above.

⁶² *Ibid.*, section 126.

⁶³ *Ibid.*, section 125.

It is necessary to specify in the articles a fixed number of directors or a minimum and a maximum number of directors.⁶⁴ When a minimum and a maximum number of directors is chosen, the precise number of directors to be elected may be determined from time to time by ordinary resolution of the members. The members may also delegate this power to the directors.⁶⁵

The corporation must notify Corporations Canada of any change of directors within the maximum and minimum range set out in the articles within 15 days following the change. A director who has moved must notify the corporation within 15 days after moving, and the corporation must notify Corporations Canada of the change in residential address of the director.⁶⁶ The members may change the number of or the minimum or maximum number of directors by amending the articles. However, any decrease cannot shorten the term of an incumbent member.⁶⁷ That being said, the members may shorten the term of an incumbent member by removing the director, subject to a particular class' right to remove a director exclusively elected by it.⁶⁸

A director holds office for a term set out in the by-laws, which must not be more than four years.⁶⁹ Where a director is not elected for a specified term, he or she will hold office until the close of the first annual members' meeting following his or her election. The CNCA permits staggered terms, thus allowing directors to hold office for different term lengths. If no successor directors are elected at a members' meeting, then the incumbent directors will continue in office notwithstanding the rules regarding the prescribed four year expiry date and directors elected for unspecified terms.⁷⁰

A director ceases to hold office when he or she dies, resigns, is removed, becomes a bankrupt or is declared incapable.⁷¹ Members may remove a director by ordinary resolution at a special meeting. Where a director was elected by a class of members that have the exclusive right to

⁶⁴ *Ibid.*, section 7(1).

⁶⁵ *Ibid.*, section 133(3).

⁶⁶ *Ibid.*, section 134.

⁶⁷ *Ibid.*, section 133.

⁶⁸ *Ibid.*, section 130.

⁶⁹ *Ibid.*, section 128(3).

⁷⁰ *Ibid.*, section 128(2)-(6).

⁷¹ *Ibid.*, section 129.

elect the director, only that class or groups may remove the director by ordinary resolution. Although it is common in the NFP sector to require a two-thirds majority vote of the members in order to remove a director, this is not possible under the CNCA. The CNCA specifically provides that it is not permissible for coronations to require a higher level of approval than an ordinary resolution to remove directors.⁷²

If a vacancy occurs, the remaining directors may continue to exercise the powers of directors as long as the number of directors constitutes a quorum (*i.e.*, a majority of the directors or the minimum number of directors required at a meeting is present unless specified otherwise in the corporation's by-laws).⁷³ A vacancy created by the removal of a director may be filled at the same meeting where the removal occurred or at a later date.⁷⁴ When a vacancy is filled, a director appointed or elected to fill the vacancy holds office for the unexpired term of their predecessor.⁷⁵

All directors, whether they are elected or appointed, must take action to confirm their directorship otherwise the appointment or election will not be effective. In the case of an individual who was present at the meeting when the election or appointment took place, he or she is deemed to have consented to act as a director, unless they refuse to be elected or appointed. In the case of an individual who was not present at the meeting, he or she must consent in writing before the actual election or appointment or within ten days thereafter. In the alternative, the person must act as a director after the election or appointment.⁷⁶

5. Board meetings

Board meetings can be held at such time and place that the board wishes, unless the corporation's by-laws or articles provide otherwise.⁷⁷ A quorum of the directors must be present at board meetings. The quorum may be set out in the articles or the by-laws. If the by-laws are silent, a quorum shall be a majority of the number of directors or minimum number of directors required by the articles. Despite any vacancy among the directors, a quorum of directors may

⁷² *Ibid.*, section 7(4) and (5).

⁷³ *Ibid.*, section 136(2).

⁷⁴ *Ibid.*, section 130.

⁷⁵ *Ibid.*, section 132(6).

⁷⁶ *Ibid.*, section 128(9).

⁷⁷ *Ibid.*, section 136(1).

exercise all of the powers of the directors.⁷⁸ If a corporation has only one director, that director may constitute a meeting.⁷⁹ If a director is absent from a board meeting, he or she cannot appoint someone else to act on his or her behalf at the meeting.⁸⁰

Notice of board meetings must be provided to the directors according to the by-laws. The notice need not specify the purpose of or the business to be transacted at the meeting, unless the meeting involves any matter that requires member approval, fills a vacancy of a director or the public accountant, appoints additional directors, issues debt obligations, approves financial statements, adopts, amends or repeals by-laws, or establishes members' contributions or dues.⁸¹ Notice of meeting can be waived by the directors and attendance at a board meeting is deemed to constitute a waiver, unless the director attends the meeting for the purpose of objecting to the holding of the meeting because it is not lawfully called. Notice of an adjourned meeting of directors is not required to be given if the time and place of the adjourned meeting is announced at the original meeting.⁸²

Directors may conduct business by signing written resolutions in lieu of holding meetings, provided that the resolutions are signed by all directors.⁸³ Unless the by-laws provide otherwise, directors may participate in board meetings by telephone or electronically, provided that all the directors of the corporation consent and that the directors can communicate adequately with each other. As well, how these meetings may be held will also need to comply with requirements set out in the regulations to be made under the CNCA in the future.⁸⁴

6. Duties and due diligence defence of directors and officers

The directors have the duty to manage and supervise the activities and affairs of the corporation.⁸⁵ However, such duties may be restricted by the articles or unanimous member agreement. The directors may appoint one of them to act as a managing director or appoint a

⁷⁸ *Ibid.*, section 136(2).

⁷⁹ *Ibid.*, section 136(6).

⁸⁰ *Ibid.*, section 126 (3).

⁸¹ *Ibid.*, sections 136(1), 136(3) and 138(2).

⁸² *Ibid.*, sections 136(3) to (5).

⁸³ *Ibid.*, section 140(1).

⁸⁴ *Ibid.*, section 136 (7).

⁸⁵ *Ibid.*, section 124.

number of directors to act as a committee of directors, and delegate to the managing director or committee any of the powers of the directors.⁸⁶ However, directors are not, in their capacity as directors, trustees for any property of the corporation, including property held in trust by the corporation.⁸⁷

Directors may designate offices of the corporation (*e.g.*, president, secretary or any other position), appoint officers and delegate powers to them to help the board to manage the corporation. There is no requirement whether an officer must be a director of the corporation. Two or more offices may be held by the same person.⁸⁸ However, regardless of the officer position designated by the board, the following persons are also defined in the CNCA to be “officers”: the chairperson of the board, the president, a vice-president, the secretary, the treasurer, the comptroller, the general counsel, the general manager or a managing director of a corporation, or any other individual who performs functions for a corporation similar to those normally performed by an individual occupying any of those offices.⁸⁹

Directors’ duties in the CNCA are modelled on those found in the CBCA. Notably, these same duties are absent from provisions in the CCA relating to corporations without share capital. The inclusion of these duties in the CNCA marks a shift from a common law regime to a statutory one. This shift implies greater protections for directors, such as indemnification and the availability of defences.

Directors and officers are also required to act honestly and in good faith with a view to the best interests of the corporation; and to exercise the care, diligence and skill of a reasonably prudent person in comparable circumstances.⁹⁰ These duties are judged on an objective standard of care. In other words, in determining whether a director or officer has breached his or her duty to the corporation, the court will test the person’s actions against that of a reasonably prudent person. This standard is lower than the common law subjective standard of care, assessing a person’s actions against what may reasonably be expected from a person of his or her knowledge and experience.

⁸⁶ *Ibid.*, section 138.

⁸⁷ *Ibid.*, section 32.

⁸⁸ *Ibid.*, section 142.

⁸⁹ *Ibid.*, section 2(1).

⁹⁰ *Ibid.*, section 148(1).

As well, directors and officers are required to comply with the CNCA and its regulations, the articles, the by-laws and any unanimous member agreement.⁹¹ Directors (but not officers) are subject to additional duties under the CNCA. For example, directors must be informed about the corporation's activities and to ensure the lawfulness of the articles and the purpose of the corporation.⁹² Directors who vote for or consent to a resolution authorizing any payment or distribution or any payment of an indemnity contrary to the CNCA are liable to repay the corporation any money or property so paid or distributed.⁹³ Directors are also liable to employees of the corporation for up to six months' unpaid wages while they are directors and for two years after leaving the board.⁹⁴

In meeting their duties, directors and officers would not be liable if they have exercised the care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances, including reliance in good faith on reports prepared by professionals. Directors (but not officers) may also rely on the corporation's financial statements prepared by the corporation's public accountant.⁹⁵

Both current and former directors and officers may be advanced defence costs and indemnified by the corporation. However, indemnification is only permitted where a director or officer fulfilled his or her duty to act honestly and in good faith with a view to the best interests of the corporation, and in the case of a criminal or administrative matter that is enforced by a monetary penalty, there is reasonable grounds for believing that the conduct of the director/officer in question was lawful. In these circumstances, there is a right to indemnification provided that the director or officer in question has not been found by a court to have committed any fault or omitted to do anything they ought to have done. The CNCA also permits corporations, should they choose to do so, to insure individuals for any liability incurred in their capacity as directors or officers.⁹⁶

⁹¹ *Ibid.*, section 148(2).

⁹² *Ibid.*, section 148(3).

⁹³ *Ibid.*, section 145.

⁹⁴ *Ibid.*, section 146.

⁹⁵ *Ibid.*, sections 149(1) and (2), 150(1) and (2).

⁹⁶ *Ibid.*, section 151.

Directors and officers must also disclose any personal interest they may have in a material contract with the corporation. If a director or an officer fails to make such a disclosure, the corporation or a member may apply to a court to request the contract be set aside and the director repay any profits or gain realized on the contract.⁹⁷ However, directors of an NFP corporation that is also a registered charity are not only required to disclose their conflict of interest, but also to resign from the board should the charity decide to proceed with the contract resulting in a personal benefit of the director. This is because at common law, directors of incorporated charities cannot place their personal interests in conflict with their duty to the corporation.⁹⁸

7. Members

All NFP corporations must be membership-based corporations. The articles must set out the classes, regional or other groups of members that the corporation is authorized to have. The by-laws must set out the conditions required for being a member of the classes that are described in the articles. Membership is not restricted to individuals, and may be open to corporations and other entities as provided for in the by-laws.⁹⁹

In terms of voting rights, if there is only one class of members, then all the members must have the right to vote at meetings of members; if there are more than one class, the articles must set out any voting rights attached to the classes, and at least one class must have the right to vote; and unless the articles state otherwise, all members have the right to vote.¹⁰⁰

The articles and by-laws may provide how membership may be issued.¹⁰¹ Unless the by-laws or articles provide otherwise, a member will cease to hold membership in a corporation if the member dies, resigns, is expelled, or the term of membership expires, or if the corporation is liquidated and dissolved.¹⁰² Unless the by-laws provide otherwise, a membership may only be

⁹⁷ *Ibid.*, section 141.

⁹⁸ *Supra* note 43.

⁹⁹ *Supra* note 1, sections 7(1) and 154(1) to (4).

¹⁰⁰ *Ibid.*, sections 154(3)-(5).

¹⁰¹ *Ibid.*, section 155.

¹⁰² *Ibid.*, section 156.

transferred back to the corporation.¹⁰³ Upon the termination of membership, the member's rights, including any right to the corporation's property, cease to exist.¹⁰⁴

It is important to be aware that a separate vote by class or group of members is required under the CNCA if the corporation wants to change the rights attached to a class or group of members or for certain fundamental changes, regardless of whether the membership class is a voting class or non-voting class. This means that each class of members (including non-voting members) will have a de facto veto rights for those matters. Specifically, the CNCA provides that members of each class are entitled to vote separately as a class on a proposal to make certain amendments to the articles and by-laws (regardless of whether they otherwise may have the right to vote).¹⁰⁵ The amendments are:

(a) effect an exchange, reclassification or cancellation of all or part of the memberships of the class or group;

(b) add, change or remove the rights or conditions attached to the memberships of the class or group, including (i) to reduce or remove a liquidation preference, or (ii) to add, remove or change prejudicially voting or transfer rights of the class or group;

(c) increase the rights of any other class or group of members having rights equal or superior to those of the class or group;

(d) increase the rights of a class or group of members having rights inferior to those of the class or group to make them equal or superior to those of the class or group;

(e) create a new class or group of members having rights equal or superior to those of the class or group; or

(f) effect an exchange or create a right of exchange of all or part of the memberships of another class or group into the memberships of the class or group.

¹⁰³ *Ibid.*, section 154(8).

¹⁰⁴ *Ibid.*, section 157.

¹⁰⁵ *Ibid.*, sections 199(1) and (2).

The only exception to the requirement of a separate class vote is if the corporation's articles provide that a certain membership class does not have the right to vote in respect of changes referred to in (a) and/or (e) above, *i.e.*, changes that effect an exchange, reclassification or cancellation of all or part of the memberships of the class or group; and changes that create a new class or group of members having rights equal or superior to those of the class or group. If the amendments are in relation to (b) to (d) or (f), then a separate class vote will be mandatory, with no exceptions.

As well, separate class votes are also provided in the CNCA with respect to approval of certain fundamental changes, such as amalgamation; continuance; or the sale, lease or exchange of all or substantially all of the property of a corporation other than in the ordinary course of its activities.¹⁰⁶

For this reason, where it is not desirable to seek approval by class votes in the manner provided for in the CNCA resulting in a de facto class veto mechanism, it will be necessary to have only one class of members and to develop workarounds on how to involve other individuals in the corporation. For example, if a corporation wants to involve broad-based community support of its NFP purposes, consideration may be given to enlist them in some capacity in the corporation, but not as members, whether voting or non-voting. It is important to ensure that they are not referred to as "members". Possible alternatives may include affiliates, associates, supporters, volunteers, etc.

A mechanism in the CNCA that addresses the needs of the NFP sector is that the articles or by-laws may give the directors, the members, or a committee the power to discipline a member or terminate his or her membership. This provision is a statutory response to the courts' reluctance to intervene in the affairs of a voluntary relationship, and inadequate provisions in organizations' by-laws addressing this issue. If such a power is provided for, then the articles or by-laws must also set out the circumstances and the manner in which a member may be disciplined or membership terminated.¹⁰⁷ The CNCA does not set out any minimum procedural threshold, though the case law suggests that organizations have the duty of fairness, including advising the

¹⁰⁶ *Ibid.*, sections 206(4), 212(4) and (5), 214 (5) and (6).

¹⁰⁷ *Ibid.*, section 158.

affected member about the case and the process, and providing him/her an opportunity to be heard.¹⁰⁸

Upon request, members and their personal representatives may access corporate records and, at a reasonable fee, take extracts from certain records during the corporation's usual business hours. They are also entitled to a free copy of the articles, by-laws and any unanimous member agreement.¹⁰⁹

8. Members' meetings

An annual members' meeting must be held within 18 months after incorporation. Thereafter, an annual members' meeting must be held within 15 months after the previous annual members' meeting but no later than 6 months after the fiscal year end. The annual meetings must be called by the directors. Directors may also call special members' meeting at any time.¹¹⁰ Corporations Canada may authorize the corporation to delay holding the annual meeting as long as members will not be prejudiced.

Meetings of members must be held in Canada at the place provided in the by-laws, or where no such provision exists, at the place chosen by the directors. It is possible to hold meetings outside of Canada, but that place must be specified in the articles or agreed by all of the members.¹¹¹ In lieu of holding a meeting to pass a resolution, a resolution in writing may be validly passed if signed by all of the voting members.¹¹²

Notice of a members' meeting must be given in accordance with the by-laws to members who are entitled to vote, the directors and the public accountant of the corporation. The notice provisions in the by-laws must comply with the detailed requirements in the regulations of the CNCA. The regulations provide minimum and maximum notice periods and specific means of how notice may be provided. If the by-laws do not comply with these requirements, or if no

¹⁰⁸ See Jane Burke-Robertson, "Countdown To The Canada Not-For-Profit Corporations Act Practice Tip #4: Discipline Of Members And New Remedies Under CNCA", *Charity Law Bulletin* No. 213, May 27, 2010 (online: <http://www.carters.ca/pub/bulletin/charity/2010/chylb213.pdf>).

¹⁰⁹ *Supra* note 1, section 22.

¹¹⁰ *Ibid.*, section 160.

¹¹¹ *Ibid.*, sections 159(1)-(2).

¹¹² *Ibid.*, section 166.

method is provided for in the by-laws, the notice has to be mailed or personally delivered to the members by mail 21 to 60 days before the day on which the meeting is to be held.¹¹³ Notice may be waived by attending the meeting, though a member who attends for the purpose of objecting to the transacting of any business on the grounds that the meeting was not lawfully called does not waive notice.¹¹⁴

Members who are entitled to notice are those who appear in the members' register on the record date. The directors may, by resolution, fix a record date that is not more than 60 days and not less than 21 days before the meeting. If the directors do not do so, then the record date shall be the close of business on the day immediately preceding the day on which notice is given or, if no notice is given, the day on which the meeting is held.¹¹⁵

Unless the by-laws otherwise provide, a person may participate in a members' meeting by means of a telephonic, an electronic or other communication facility that permits all participants to communicate adequately. As well, the by-laws may allow a members' meeting be held entirely by means of a telephonic, an electronic or other communication facility that permits all participants to communicate adequately. How these meetings may be held will also need to comply with requirements set out in the regulations to be made under the CNCA in the future.¹¹⁶

The general rule is that members must vote when in attendance at the meeting. However, the by-laws may permit members to vote at meetings of members without being present at the meeting by using one or more of the absentee voting methods set out in the regulations under the CNCA, *i.e.*, proxy, mail-in ballot, and vote by means of telephonic or other electronic communication facility. If a corporation wishes to permit its members to vote by absentee voting, the by-laws must set out which of the permitted option(s) may be used.¹¹⁷

The directors are responsible for calling annual and special meetings of members, but members who hold at least 5% of the voting rights (or a lower percentage set out in the by-laws) may requisition a members' meeting be called. The directors must call a meeting within 21 days of

¹¹³ *Ibid.*, sections 162(1) to (3) and section 272(1).

¹¹⁴ *Ibid.*, section 162(4).

¹¹⁵ *Ibid.*, section 161.

¹¹⁶ *Ibid.*, sections 159(4) and (5).

¹¹⁷ *Ibid.*, section 171(1).

the requisition, failing which any member who signed the requisition may call the meeting. However, the directors do not have to call a meeting if the directors have already established a record date for determining members entitled to receive notice of a meeting of members; the directors have already called a meeting, or the business stated in the requisition is improper.¹¹⁸

As well any member entitled to vote at an annual members' meeting may submit a proposal to the corporation on any matter that the member proposes to raise at the meeting, including to make, amend or repeal a by-law.¹¹⁹ A proposal may include nominations for the election of directors, but such a proposal must be signed by at least 5% (or a lower percentage set out in the by-laws) of the members entitled to vote at the annual meeting. The directors are not obliged to include the proposal if: the submission of the proposal does not meet the requirements explained above; the proposal is to enforce a personal claim or redress a personal grievance; the proposal does not relate in a significant way to the activities or affairs of the corporation; not more than two years before the receipt of the proposal and at another meeting, the member failed to raise the matter covered by the proposal; substantially the same proposal was previously submitted to members less than five years ago and did not receive the minimum required support at the meeting; or the rights to submit proposals are being abused to secure publicity.

It is possible for the by-laws to include a provision allowing the directors to make decisions by consensus (in lieu of a vote) for matters other than a decision of a designated corporation not to appoint a public accountant or situations where a special resolution is required. It is possible for the by-laws to include a provision allowing the members to make decisions by consensus, but not in relation to a vote of a designated corporation not to appoint a public accountant or matters where a special resolution is required. Such by-laws would need to clearly define what is meant by "consensus", how to determine when a consensus cannot be reached, and how to refer to a vote any matter on which consensus cannot be reached.¹²⁰

¹¹⁸ *Ibid.*, section 167.

¹¹⁹ *Ibid.*, sections 163 and 152(6).

¹²⁰ *Ibid.*, section 137.

9. Members' remedies

The CNCA provides special rights for members to seek remedy and recourse against an NFP corporation as discussed below.

A derivative action is the ability of a complainant to apply to a court for an order granting it leave to bring an action in the name of and on behalf of the corporation, or to intervene in an action to which the corporation is party.¹²¹ The complainant must satisfy the court that it is bringing the derivative action in good faith and that the action is in the interests of the corporation.¹²² This remedy is not available to religious corporations where the decision of the directors in question is based on a tenet of faith held by the members of the corporation, and it was reasonable to base the decision on a tenet of faith, having regard to the activities of the corporation.¹²³

An oppression remedy is the ability of a complainant to apply for a remedy on the basis that any act or omission of the corporation, or the exercise of the powers of the directors or officers of the corporation, is oppressive or unfairly prejudicial or unfairly disregards the interests of the member.¹²⁴ The court may make any order it thinks fit, including compliance, restraining and compensation orders. This remedy is also not available to a religious corporation for similar grounds of faith-based defence against a derivative action explained above.¹²⁵

A compliance or restraining order is available to a member who applies to a court for an order directing the corporation or any director, officer, employee, agent or mandatary, public accountant, trustee, receiver, receiver-manager, sequestrator or liquidator or a corporation to comply with the CNCA, the regulations, the corporation's articles, by-laws or a unanimous member agreement, or restraining any person from acting in breach of them.¹²⁶

¹²¹ *Ibid.*, sections 251 and 252.

¹²² *Ibid.*, sections 251(1)-(2).

¹²³ *Ibid.*, section 251(3).

¹²⁴ *Ibid.*, section 253.

¹²⁵ *Ibid.*, section 253(2).

¹²⁶ *Ibid.*, section 259.

Aside from those three major remedies, there are various remedies that can be employed to enforce specific rights enumerated in the CNCA. For example, if a corporation fails to comply with the requirements regarding the holding of annual members' meetings, then an interested person may apply for an order dissolving the corporation. A member may apply for an order to liquidate and dissolve a corporation if: the corporation oppressed the member; a unanimous member agreement entitles the member to demand dissolution upon the occurrence of a condition precedent; or it is just and equitable to do so.¹²⁷ An additional remedy is available for a member who is aggrieved by a corporation's refusal to include his or her proposal by applying for a court order to restrain the holding of the meeting at which the proposal is sought to be presented.¹²⁸

10. Amalgamations, import and export

The CNCA permits two or more CNCA corporations to amalgamate with each other.¹²⁹ Depending on the circumstances, a long form and short form amalgamation may be used. If corporations proposing to amalgamate have different members, a long form amalgamation is required. In that case, the amalgamating corporations will enter into an amalgamation agreement. The membership must approve the amalgamation agreement by special resolution.¹³⁰ A vertical short form amalgamation involves the amalgamation of a parent holding corporation and one or more of its subsidiaries. A horizontal short form amalgamation involves the amalgamation of two or more wholly-owned subsidiaries of a corporation. Vertical and horizontal amalgamations do not require an amalgamation agreement or membership approval. The approval of the board of each amalgamating corporation is sufficient to proceed with amalgamation.¹³¹

The CCA currently does not permit CCA Part II corporations to be continued under another jurisdiction, or a corporation from another jurisdiction to continue under the CCA. A welcome change brought about by the CNCA is that it permits CNCA corporations to leave the CNCA and

¹²⁷ *Ibid.*, section 224.

¹²⁸ *Ibid.*, section 163(9).

¹²⁹ See Jane Burke-Robertson and Theresa L.M. Man, "Countdown to the Canada Not-For-Profit Corporations Act Practice Tip #7: Importing, Exporting, And Amalgamation" Charity Law Bulletin No. 231, October 27, 2010 (online: <http://www.carters.ca/pub/bulletin/charity/2010/chylb231.pdf>).

¹³⁰ *Supra* note 1, sections 205 and 206.

¹³¹ *Ibid.*, section 207.

be continued under the laws of another jurisdiction (export), and permits corporations formed under other jurisdictions to be continued under and be governed by the CNCA (import).¹³²

11. By-laws

Soon after incorporation, by-laws should be passed which contain the rules concerning the governance and operations of the corporation. For CCA Part II corporations, by-laws that comply with the CNCA should be prepared at the same time as the articles of continuance so that the new by-laws can kick into effect to govern the corporation as soon as a certificate of continuance has been issued.

It is necessary to send copies of any new by-laws, amendments or repeal of by-laws to Corporations Canada within 12 months of such changes being confirmed or approved by members. Corporations Canada will not review or approve the new by-laws, but they will be available for public viewing through Corporations Canada.

The CNCA provides two ways for corporations to amend their by-laws, depending on the subject matter of the changes.

In general, the directors may, by resolution, make, amend or repeal any by-laws that regulate the activities or affairs of the corporation, unless the articles, the by-laws or a unanimous member agreement otherwise provides. However, the directors must submit the by-law, amendment or repeal to the members at the next meeting of members. At that meeting, the members may, by ordinary resolution, confirm, reject or amend the by-law, amendment or repeal. The effective date of the by-law, amendment or repeal is the date when the directors approved it, not when the members confirmed it. If the members reject the by-law, it will immediately cease to have effect on the date of the members' meeting. If the directors fail to submit the by-law to the members, it will also cease to have effect on the date of the members' meeting when it should have been submitted to the members. If a by-law, an amendment or a repeal ceases to have effect, a

¹³² *Ibid.*, sections 211, 212, 213. See Jane Burke-Robertson and Theresa L.M. Man, "Countdown to the Canada Not-For-Profit Corporations Act Practice Tip #7: Importing, Exporting, And Amalgamation" *Charity Law Bulletin* No. 231, October 27, 2010 (online: <http://www.carters.ca/pub/bulletin/charity/2010/chylb231.pdf>) for details.

subsequent resolution of the directors that has substantially the same purpose or effect must be confirmed or confirmed as amended by the members before it can be effective.¹³³

The above mechanism does not apply to by-law amendments for matters referred to in subsection 197(1) of the CNCA. These provisions are in relation to membership of the corporation that are to be set out in the by-laws.¹³⁴ These by-law amendments must be approved by special resolution of the members and these changes are effective only upon members' approval. If any of these matters also relate to those membership issues set out in subsection 199(1), approval of these by-law amendments will require a separate class vote (regardless of whether the class is a voting or non-voting) as explained above.¹³⁵

It is therefore important that by-laws clearly indicate that these types of changes require a special resolution of the members and are not effective until the members have approved them. Examples of options include:

- adopt two by-laws, one would contain all by-law provisions that require a special resolution to change and all remaining provisions would be included in another by-law which requires only an ordinary resolution to amend;
- adopt one by-law, and group all matters requiring a special resolution into one clearly marked section which would require a special resolution to change, with the balance requiring an ordinary resolution;
- adopt one by-law, but clearly mark throughout the by-laws which provisions require special resolution to amend; or

¹³³ *Supra* note 1, section 152.

¹³⁴ These provisions are 197(e) change a condition required for being a member; (f) change the designation of any class or group of members or add, change or remove any rights and conditions of any such class or group; (g) divide any class or group of members into two or more classes or groups and fix the rights and conditions of each class or group; (h) add, change or remove a provision respecting the transfer of a membership; (l) change the manner of giving notice to members entitled to vote at a meeting of members; and (m) change the method of voting by members not in attendance at a meeting of members.

¹³⁵ *Supra* note 1, section 199(1).

- adopt one by-law, but include a provision in the articles requiring by-law changes be subject to a special resolution of members (in other words, remove the general default mechanism for by-law amendments).¹³⁶

E. FEDERAL SPECIAL ACT CORPORATIONS

Instead of being incorporated under the CCA, some federal non-share capital corporations are incorporated by special legislation of the Parliament of Canada. A special act corporation is subject to its own special legislation which, together with any by-laws that may have been passed, governs the corporation. In addition, there are a few provisions under the existing Part III of the CCA which apply to special act corporations that are incorporated for the purpose of carrying on “objects, to which the legislative authority of the Parliament of Canada extends, of a national, patriotic, religious, philanthropic, charitable, scientific, artistic, social, professional or sporting character or the like objects.”¹³⁷ Part III of the CCA was repealed by Part 19 of the CNCA (*i.e.*, sections 294, 295 and 296), which automatically applies to special act corporations.¹³⁸ No continuance process or any steps will need to be taken by special act corporations.

Similar to the mechanism in the CCA allowing special act corporations to continue under Part II of the CCA and become letters patent corporations,¹³⁹ CNCA also permits special act corporations to continue under the CNCA. Once a special act corporation has continued under the CNCA, it will be subject to Parts 1 through 18 of the CNCA, and will no longer be governed by its own special legislation. Any special act corporations desiring to be continued under the CNCA in this manner will need to complete a continuance process under subsections 212(2) and 212(6) of the CNCA. The continuance process is essentially the same as that for CCA Part II corporations reviewed in this paper.

¹³⁶ *Ibid.*, section 7(4).

¹³⁷ *Ibid.*, section 158.

¹³⁸ For an overview of the rules in sections in Part 19 that apply to special act corporations, see Jane Burke-Robertson and Theresa L.M. Man, *Charity Law Bulletin* No. 247, “Countdown To The Canada Not-For-Profit Corporations Act Practice Tip #9: Special Act Corporations”, March 31, 2011 (online: <http://www.carters.ca/pub/bulletin/charity/2011/chylb247.pdf>).

¹³⁹ *Supra* note 1, section 159.

F. DRAFTING ARTICLES OF INCORPORATION/CONTINUANCE

As part of the incorporation process, articles of incorporation will need to be filed. The articles of incorporation will be attached to the certificate of incorporation issued by Corporations Canada. In the case of a continuance, articles of continuance will need to be filed. The articles of continuance will be attached to the certificate of continuance issued by Corporations Canada. The certificate of continuance and the articles of continuance together replace the corporation's letters patent and supplementary letters patent.

The articles of incorporation and articles of continuance are almost the same. Both forms are available on Corporations Canada's website.

When preparing the articles, it is prudent for new by-laws to be prepared at the same time, because:

- it is necessary to coordinate the provisions set out in these two documents (*e.g.*, membership classes and board size);
- it is necessary to decide what default provisions in the CNCA to override and whether the overriding provision should be included in the articles or the by-laws; and
- even if the CNCA requires certain provisions to be set out in the by-laws, it is possible to include them in the articles instead.

The following information must be included in the articles.

1. Corporate name

For an incorporation, the proposed corporate name must be set out in the articles of incorporation, accompanied by a NUANS Name Search Report. The proposed corporate name must meet the requirements in the CNCA and the regulations.¹⁴⁰

¹⁴⁰ *Ibid.*, sections 11 and 13 and Part 3 of the regulations.

In the case of a continuance, the current corporate name must be inserted in the articles. Note that if the corporate name had previously been changed, the revised corporate name as shown in the supplementary letters patent will need to be inserted, rather than the original corporate name shown on the letters patent. If the corporate name includes the French form of the name, the French name will also need to be included.

It is possible to change the corporate name as part of the continuance process. If no changes are desired, this item will need to be left blank. To change the corporate name, the proposed corporate name will need to be inserted, accompanied by a NUANS Name Search Report. The proposed corporate name must meet the requirements in the CNCA and the regulations.¹⁴¹

Under the CNCA, it is possible to use a numbered name.¹⁴² In a continuance, it is possible to change the corporate name into a numbered name as part of the continuance process. If this is desired, then a blank space will be left in lieu of a corporate name, and Corporations Canada will assign a number to the corporation. The space will need to be followed by the word “Canada” and one of the following words “Association”, “Center”, “Centre”, “Fondation”, “Foundation”, “Institut”, “Institute” or “Society”.¹⁴³

2. Corporation number

In the case of existing CCA Part II corporations applying for continuance, the number assigned by Corporations Canada when the corporation was incorporated will need to be inserted. This number can be found on the letters patent, supplementary letters patent, correspondence from Corporations Canada, and Corporations Canada’s website database for federal corporations.¹⁴⁴

3. Province or territory in Canada where registered office is located

The province or territory in which the registered office is/will be situated will need to be inserted. Under the CCA, the municipality and province in which the head office is located is to be included in the letters patent. Under the CNCA, the municipality and street address for the registered office is not to be included in the articles, but to be included in the notice of initial

¹⁴¹ *Ibid.*, sections 11 and 13 and Part 3 of the regulations.

¹⁴² *Ibid.*, section 12(2).

¹⁴³ Section 58(2) of the regulations.

¹⁴⁴ https://www.ic.gc.ca/app/scr/cc/CorporationsCanada/fdrlCrpSrch.html?locale=en_CA.

registered office address and first board of directors, which is a separate document to be completed and filed with the articles.

4. Number of directors

The number of directors on the board will need to be inserted in the articles. It is possible to set out a fixed number of directors or a maximum and minimum range of directors. For existing CCA Part II corporations applying for continuance, this information is contained in the by-laws.

It is important to keep in mind that if it is anticipated that the corporation will become a soliciting corporation under the CNCA, then it must have at least three directors, so the minimum number to be set out in the articles must be at least three.

If it is anticipated that the corporation will become a non-soliciting corporation, then it is possible for the board to have a few as one director. However, if the articles specified that there shall only be 1 or 2 directors on the board or if the maximum number is 2 directors, then in the event that the corporation is to become a soliciting corporation in a particular year, this change of status will require a change to its articles. To avoid the need to change its articles in the future in that scenario, it might be prudent not to have the articles restrict the board to 1 or 2 directors. An example would be a minimum of 1 and a maximum of 10 directors, and then the precise number of directors to be elected may be determined from time to time by ordinary resolution of the members.¹⁴⁵ This power may also be delegated to the directors.¹⁴⁶

5. Statement of purpose

The purposes of the corporation will need to be inserted in the articles.

For existing CCA Part II corporations applying for continuance, the objects are set out in its letters patent or as amended by supplementary letters patent. If no changes to the objects are desired, then the same objects can be inserted in the articles. If the corporation desires to change its objects, the new objects should be inserted in the articles.

¹⁴⁵ *Supra* note 1, section 133(3).

¹⁴⁶ *Ibid.*

6. Restrictions on activities of the corporation

If there will be any restrictions on the activities of the corporation, those restrictions will need to be set out in the articles. If there are no such restrictions, insert “none”.

7. Classes, or regional or other groups of members that the corporation is authorized to establish

Under the CCA, membership classes are set out in the by-laws. Under the CNCA, the classes, regional or other groups of members that the corporation is authorized to establish must be set out in the articles.¹⁴⁷ If there are more than one class or group of members, then the articles must set out what the classes or groups are, and any voting rights attached to each class or group, provided that the members of at least one class or group must have voting rights.¹⁴⁸ In both cases, the by-laws must set out the conditions required to be admitted into membership, including whether a corporation or other entity may be a member.¹⁴⁹ If there are more than one class or group of members, the by-laws must set out: (a) the conditions for membership in each class or group; (b) the manner of withdrawing from a class or group or transferring membership to another class or group and any conditions of transfer; and (c) the conditions on which membership in a class or group ends.¹⁵⁰

8. Statement regarding distribution of property on dissolution

The articles must state how the net assets of a corporation on dissolution would be distributed. As explained above, all soliciting corporations and registered charities (regardless of whether they are soliciting or non-soliciting corporations) must provide in their articles that any property remaining on liquidation after the discharge of any liabilities of the corporation shall be distributed to one or more qualified donees, as defined in subsection 248(1) of the *Income Tax Act*.¹⁵¹

For existing CCA Part II corporations applying for continuance, since this provision is already an existing requirement for registered charities, the dissolution clause can be the same as the one that is in the corporation’s letters patent or supplementary letters patent. For soliciting

¹⁴⁷ *Ibid.*, section 7(1)(c).

¹⁴⁸ *Ibid.*, section 7(1)(c) and section 154(4).

¹⁴⁹ *Ibid.*, section 154(1).

¹⁵⁰ *Ibid.*, section 154(2).

¹⁵¹ *Supra* note 44.

corporations that are not registered charities, their existing dissolution clause likely does not comply with this requirement and a revised clause that complies with this new requirement will need to be inserted into the articles.

9. Additional provisions

It is permissible to include other provisions that the corporation may want included in the articles. If more space is needed to insert the provisions, schedules may be attached to the articles. These provisions may be:

- provisions required by any other Act of Parliament to be set out in the articles;¹⁵²
- provisions to override default provisions contained in the CNCA as explained above;
or
- any other provision that may be set out in the by-laws¹⁵³ (and any requirement in the CNCA for provisions to be set out in the by-laws is deemed met by setting them out in the articles¹⁵⁴).

Examples of these provisions include:

- requiring a different membership approval majority greater than the statutory required majority (*e.g.*, requiring 75% approval where the CNCA requires a special resolution, or requiring a special resolution where the CNCA requires an ordinary resolution), except to require a higher level of approval than an ordinary resolution to remove directors¹⁵⁵ (such a provision is a very helpful way of addressing the CNCA requirements that amendments to certain provisions in the by-laws require a special resolution, while others require an ordinary resolution, as explained below;

¹⁵² *Ibid.*, section 7(2).

¹⁵³ *Ibid.*, section 7(3).

¹⁵⁴ *Ibid.*, section 7(3.1).

¹⁵⁵ *Ibid.*, sections 7(4) and (5).

- setting out a foreign form of corporate name in any language to be used outside of Canada (other than English and French forms of the name);¹⁵⁶
- allowing the board to appoint additional directors to hold office until the end of the next annual meeting of members, provided that the number of such appointed directors may not exceed one-third of the directors elected at the previous annual meeting of members;¹⁵⁷
- specifying a place outside of Canada where members' meetings may be held;¹⁵⁸ and
- requiring the board to obtain members' approval in order to borrow funds.¹⁵⁹

For registered charities, the Charities Directorate of CRA recommends that the following two provisions be inserted:¹⁶⁰

The corporation shall be carried on without the purpose of gain for its members, and any profits or other accretions to the corporation shall be used in furtherance of its purposes.

Directors shall serve without remuneration, and no director shall directly or indirectly receive any profit from his or her position as such, provided that a director may be reimbursed for reasonable expenses incurred in performing his or her duties. A director shall not be prohibited from receiving compensation for services provided to the corporation in another capacity.

Once the articles of incorporation have been prepared, it can be signed by the incorporators and filed with Corporations Canada.

Once the articles of continuance have been prepared, it must be approved by the members of the corporation before it can be signed by a director or officer of the corporation and then filed with Corporations Canada.

¹⁵⁶ *Ibid.*, section 11(2).

¹⁵⁷ *Ibid.*, section 128(8).

¹⁵⁸ *Ibid.*, section 159.

¹⁵⁹ *Ibid.*, section 28(1).

¹⁶⁰ Canada Revenue Agency, online: <http://www.cra-arc.gc.ca/chrts-gvng/chrts/prtng/nfpc/frm4031-eng.html>.

G. DRAFTING BY-LAWS

Other than the articles, by-laws that comply with the rules in the CNCA must also be prepared. Providing a clause by clause commentary on provisions to be included in the new by-laws or how by-laws made under the CCA (in the case of a continuance) will need to be revised to bring them into compliance with the CNCA is outside the scope of this paper.¹⁶¹ Instead, this section of the paper reviews key concepts and issues that will need to be addressed when preparing the new by-laws.

1. General issues

In the case of existing CCA Part II corporations applying for continuance, the corporation will be governed by the CNCA once the certificate of continuance has been issued. Therefore, before the articles of continuance are filed with Corporations Canada, the corporation must have new by-laws that comply with the requirements of the CNCA prepared in advance, so that these new by-laws will be ready for the governance of the corporation as soon as the certificate of continuance has been issued. Due to the many differences between the CCA and the CNCA, it is anticipated that simply amending the current by-laws to conform to the CNCA rules will involve amendments to many sections of the by-laws and make the by-laws difficult to work with on a go-forward basis. As such, it would likely be simpler and more cost efficient to have new by-laws prepared.

Under the CCA, all by-laws (including amending by-laws) must be filed with Corporations Canada for Ministerial approval before they come effective. This will lead to a delay in the effective date of by-laws after they have been approved by the members, having to take into account the time required by Corporations Canada to process the approval request. There is no longer any requirement under the CNCA to file by-laws with Corporations Canada for approval. Under the CNCA, by-laws will become effective as soon as they are adopted according to the requirements of the CNCA. As such, new by-laws prepared as part of the continuance process are not required to be filed with Corporations Canada with the articles of continuance, but it is possible to file them with the continuance package if desired. If the new by-laws are not filed with the continuance package, they must be filed with Corporations Canada within 12 months of

¹⁶¹ For a commentary in this regard, see Burke-Robertson and Godel, *supra* note 25.

its adoption. However, failure to file by-laws with Corporations Canada will not affect their validity.

2. Mandatory provisions that must be included in the by-laws

The CNCA contains very detailed rules that apply to NFP corporations. As explained above, some of the provisions are mandatory provisions which must be complied with by all NFP corporations and cannot be overridden. The CNCA also contains default rules, which would apply to NFP corporations if their articles, by-laws and any unanimous member agreement are silent on those issues. In order to override the default provisions, the overriding provisions must be set out in the document(s) specified by the CNCA (*i.e.*, articles, by-laws or unanimous member agreement). Where it is possible to override the default rules, some of the overriding provisions are limited to certain choices (alternate rules) set out in the regulations.

Under the CNCA, there are two provisions that are required to be included in the by-laws. Namely:

Conditions of membership – Under the CNCA, the by-laws must set out the conditions required to be admitted into membership, including whether a corporation or other entity may be a member.¹⁶² If there is more than one class or group of members, the by-laws must set out (a) the conditions for membership in each class or group; (b) the manner of withdrawing from a class or group or transferring membership to another class or group and any conditions of transfer; and (c) the conditions on which membership in a class or group ends.¹⁶³

Notice of meeting of members – Under the CNCA, the by-laws must set out the manner in which notice of meetings of members is to be given as prescribed in the regulations.¹⁶⁴ Four options are provided in the regulations and a corporation may choose one or more of the options. The options are:

1. sent by mail, courier or personal delivery, between 21 and 60 days before the meeting;

¹⁶² *Supra* note 1, section 154(1).

¹⁶³ *Ibid.*, section 154(2).

¹⁶⁴ *Ibid.*, section 162(1).

2. communicated by telephone or other electronic communication means, between 21 and 35 days before the meeting (provided that the by-laws also include one or more means from options 1, 3 and 4 to allow members to request receiving notice by a non-electronic means, and if no alternative is provided in the by-laws, the corporation must send a copy of the notice to the member that requests a copy¹⁶⁵);
3. affixed to a notice board not less than 30 days before the meeting; and
4. if a corporation has more than 250 members, communicated via a publication (a) at least once a week for three weeks prior to the meeting if using a newspaper, or (b) between 21 and 60 days if using a publication of the corporation that is distributed to members.¹⁶⁶

If the by-laws do not include a valid option or does not contain any provision in relation to the manner in which notice is to be given, it will be required to give notice by option 1.¹⁶⁷

It is permissible to include these provisions in the articles instead and the requirement that these provisions are to be set out in the by-laws will be deemed met.¹⁶⁸

3. Other provisions to be included in the by-laws

As explained above, the CNCA contains a set of default rules that apply to NFP corporations. Some of the default rules may be overridden, provided that the appropriate overriding provisions are contained in the document specified by the CNCA. Some of the overriding provisions are required to be included in the by-laws, as opposed to in the articles or unanimous member agreement. If desired by the corporation, these overriding provisions may be included in the articles instead and the requirement for these provisions to be included in the by-laws is deemed met.¹⁶⁹ The CNCA offers a choice for some other overriding provisions for the corporation to decide whether to include them in the articles or the by-laws; or in the articles or by-laws or

¹⁶⁵ Section 63(2) of the regulations.

¹⁶⁶ *Ibid.*, section 63(1).

¹⁶⁷ *Supra* note 1, section 162(1) of the CNA and section 63(3) of the regulations.

¹⁶⁸ *Ibid.*, section 7(3.1).

¹⁶⁹ *Ibid.*, section 7(3.1).

unanimous member agreement. When drafting the new by-laws, care must be taken to ensure that the by-laws are the appropriate document to include the desired overriding provisions.

When drafting the overriding provisions, it is necessary to ensure that these mechanisms are in compliance with the CNCA. For example, some of the overriding provisions are limited to certain choices (alternate rules) set out in the regulations. In these cases, care must be taken that the overriding provisions reflect the available alternate rules in compliance with the CNCA.

There are other provisions in the CNCA that provide certain requirements if the corporation was to adopt certain mechanisms. These types of mechanisms may be set out in the by-laws. For example:

- Audit committee - A corporation may have an audit committee. If so, the committee must consist of not less than three directors, a majority of whom are not officers or employees of the corporation or any of its affiliates, the committee must review the financial statements before they are approved by the board, and the public accountant is entitled to receive notice of and attend and speak at committee meetings, the public accountant must attend committee meetings if requested by any committee members, and the public accountant has the right to call a meeting of the committee.¹⁷⁰
- Consensus decision-making by members - The by-laws may allow the members to make decisions by consensus, including where the CNCA requires a vote to be taken. However, this manner of decision-making cannot be used for the required unanimous resolution for a designated corporation to dispense with the appointment of a public accountant referred to in subsection 182(1) of the CNCA, cannot be used where a special resolution is required under the CNCA, and cannot be used if consensus cannot be reached. If the by-laws allow consensus decision making, they must also include the following information: define the meaning of consensus; provide how to determine when consensus cannot be

¹⁷⁰ *Ibid.*, section 194. Although the CNCA does not specify whether the provision establishing the audit committee must be included in the articles or by-laws, it is common practice to include such provisions in the by-laws, although it is possible to include them in the articles.

reached; and establish a manner of referring any matter on which consensus cannot be reached to a vote.¹⁷¹

- Discipline of members - The CNCA allows the articles or by-laws of a corporation to provide the directors, the members or any committee of directors or members with the power to discipline a member or to terminate their membership. However, if the articles or by-laws provide for this power, they must also set out the circumstances and the manner in which the power may be exercised. This means that either the articles or by-laws should set out the process to be followed to terminate a membership or discipline a member. Examples include notice to the member; whether the member will be given the right to be heard or provide submissions; how the decision is made by the corporation; and whether the decision is final and binding on the member or subject to appeal.

Finally, where the CNCA is silent on a particular issue, a corporation may include provisions in the by-laws to govern that issue, provided that the provisions included do not contravene the CNCA and its regulations. Examples include dispute resolution mechanisms to resolve disputes between members, stewardship provisions dealing with charitable property of the corporation (where it is a registered charity), statement of faith subscribed to by a faith-based corporation, etc. Although these provisions may be set out in policies of the corporation, some corporations may find it helpful or necessary to include them in the by-laws.

4. Detailed by-laws or simple by-laws

There are in general two approaches for drafting the new by-laws under the CNCA, *i.e.*, the minimalist approach and the comprehensive approach.

a) Minimalist approach

The rationale for the minimalist approach is based on the fact the CNCA provides for a very detailed set of rules. As a result, there is no need to duplicate all of the mandatory rules in the by-laws, neither is there any need to duplicate any of the default rules in the by-laws if they are consistent with the governance structure and practice of the corporation. As such, the by-laws

¹⁷¹ *Ibid.*, section 137. .

could be a very simple one, containing only the two mandatory provisions as required by the CNCA to be included in the by-laws as explained above; overriding provisions that the corporation wants included to override default provisions in the CNCA; and important procedural matters of importance to the corporation.

The minimalist approach also contemplates the corporation adopting the use of a governance policy manual as much as possible by moving provisions into the governance policy manual that do not need to be included in the by-laws. It is thought that this is an effective way of simplifying the by-laws. However, it is not intended that the governance policy manual would duplicate any of the mandatory or default rules either. This means that the only place that those rules would be set out are in the CNCA and the regulations themselves.

Proponents of this approach acknowledge that the initial process of the corporation having to develop some familiarity with the CNCA and the challenge of learning and re-learning the CNCA and the regulations as staff and volunteers come and go may be a daunting one, but the benefits in the long run outweigh the disadvantages of working with detailed by-laws. One of the advantages with the minimalist approach is that the corporation will end up having a simple by-law. The other intended advantage of this approach is that by not duplicating the mandatory CNCA requirements and default rules (those that the corporation does not wish to override), it will avoid the corporation running the risk of amending them in the future, not knowing that they cannot be changed.

It should be noted that the model by-laws prepared by Corporations Canada adopts the minimalist approach. Corporations wanting to adopt the model by-laws will need to be aware of the pros and cons of such an approach. As well, as noted above, many corporations, especially the smaller ones, adopted Corporation's Canada's CCA model by-laws at the time of incorporation often as an expedient means to complete the incorporation process, without much thought to whether the provisions set out in the model by-laws actually reflect the desired corporate governance structure and practice. This time, if corporations were to adopt the model by-laws as an expedient means to undergo the continuance process, they will have to operate under the minimalist approach.

While this approach may be a workable one for large organizations, it may not be an effective approach for small and medium size volunteer organizations for the following reasons:

- The corporation will have to constantly work with 4 to 5 documents, namely the CNCA, regulations, articles, by-laws, and governance policy manual, if any. For a non-soliciting corporation, it may also need to work with a sixth document, *i.e.*, the unanimous member agreement if the members choose to enter into one. The task of being able to work with so many legal documents in order to determine the governance procedure for a corporation is not easy. In working with the various documents, the corporation will have to have a clear understanding of what the mandatory and default rules are under the CNCA; what information is prescribed in the regulation when reference is made to it in the CNCA; what default rules have been overridden by the corporation and whether the overridden provisions are contained in the articles, by-laws or unanimous member agreement; what provisions in the articles, by-laws and unanimous member agreement are intended to override which provisions in the CNCA, and what provisions are intended to adopt non-mandatory mechanisms set out in the CNCA, and what provisions are intended to address issues that the CNCA is silent on; and what to do in the event of a conflict between these documents. With the charitable and non-profit sector having a high turnover rate of directors, officers, members and volunteers, it will be difficult for them to be able to develop and maintain a sufficient level of proficiency in working with these documents.
- Even if a corporation has developed the necessary proficiency in working with these documents, the need to constantly refer to all these documents whenever it needs to address a governance procedural issue may be difficult to work with. For example, if a corporation wants to do the simple task of holding an annual members' meeting, it will have to refer to the CNCA to determine when an annual meeting has to be called; refer to the regulations to determine the prescribed periods for calling such a meeting; refer to the by-laws to determine how notice to members is to be given; refer to the regulations on what to do if the by-laws only provide for electronic means of giving notice and a member requests to receive notice by non-electronic means; refer to the articles to determine if they can hold a members' meeting outside of Canada; refer to the CNCA to

determine the quorum requirements for members' meetings if both the articles and the by-laws are silent on that issue; refer to the CNCA to see if electronic participation at meetings is permitted if the by-laws are silent; refer to the by-laws to determine if absentee voting is permitted; refer to the CNCA to see if a notice of meeting is required if the meeting was adjourned (if the by-law is silent) and refer to the regulation to see what the prescribed period is that may require a notice of the adjourned meeting; etc.

- When a particular issue is silent in the by-laws, the corporation will have to review the CNCA, regulations, the articles, unanimous member agreement and governance policy manual before it can decide if it is an issue that is outside the CNCA that the corporation can adopt by-laws to address them.
- It may not be possible to fully prevent the corporation from amending mandatory rules that apply to them by not duplicating them in the by-laws. A corporation adopting this approach will still be required to set out in its by-law certain provisions in compliance with the CNCA. For example, it must set out in the by-laws one or more of the prescribed manners of giving notice of members' meetings, and one of the prescribed means of absentee voting. These provisions also cannot be changed, other than choosing another option prescribed in the regulations for these issues. As such, the corporation will continue to run the risk of amending the option set out in their by-laws in a manner that is not permitted under the CNCA, and they will have to seek legal advice in order to ensure what they intend to do is permissible under the CNCA.
- The use of a governance policy manual would not be of help to ease the complicated process explained above, since it is intended that that this approach will not have the mandatory or default rules duplicated in the manual. As such, the manual is only intended to provide for other matters not regulated by the CNCA.

b) Comprehensive approach

The comprehensive approach, on the other hand, is intended to have the by-laws as the main document for all of the governance rules of the corporation where possible. This approach is familiar to CCA Part II corporations, since it has been necessary for those corporations to have

comprehensive by-laws under the CCA, because the CCA only has a few rules that govern CCA corporations. The comprehensive by-laws will be a consolidation of all of the mandatory rules and default rules (that are not to be overridden) that apply to the corporation; overriding provisions that are permitted to be set out in the by-laws, and any other provisions that the corporation desires to be included in the by-laws. Of course, the comprehensive by-laws will only include provisions that are relevant to the day-to-day governance issues (such as the conduct of members' and board meetings; membership issues, qualification requirements, admission procedure, term, termination criteria, etc.; directors qualification requirements, term, election, termination, filling of vacancies, etc.), but not other issues regulated by the CNCA (such as maintenance of corporate records, access to records by members, fundamental changes, etc.)

Since the CNCA now requires many more provisions (as compared to the CCA) to be included in the articles, the corporation will nevertheless have to work with the articles as well. It is also possible to use a governance policy manual for matters that do not have to be included in the by-laws, such as committee structure (except audit committee due to the requirement to comply with the specific rules in the CNCA¹⁷²), directors nominations procedure, etc. The end result is that the corporation will have to work with the articles, the by-laws, and governance policy manual, as well as unanimous member agreement in the case of a non-soliciting corporation. But they will not need to also review the CNCA and the regulations for most governance issues.

In order to avoid the corporation unintentionally changing by-law provisions that cannot be changed, or to ensure that by-law changes desired are permissible under the CNCA, safeguards will need to be put in place. One way is to clearly mark in the by-law what provisions can be amended and what provisions cannot. In addition, the corporation can seek legal advice before it amends the by-laws in order to ensure what the corporation intends to do is permissible under the CNCA, which is also a necessary step for corporations that adopt the minimalist approach.

Obviously, such by-laws will require careful drafting and the assistance of legal advisors in preparing it is necessary, which in turn means additional cost for the corporation at the outset. However, once prepared, it will be a very helpful tool for the corporation and will ease the

¹⁷² *Supra* note 170.

administrative burden in that it will not need to struggle with 5 or 6 documents every time a governance issue arises.

5. By-law approval

As explained above, the CNCA provides two ways for corporations to amend their by-laws, depending on the subject matter of the changes. In general, the directors may, by resolution, make, amend or repeal any by-laws that regulate the activities or affairs of the corporation, subject to subsequent confirmation by the members. However, this mechanism does not apply to by-law amendments for matters referred to in subsection 197(1) of the CNCA. These provisions are in relation to membership of the corporation that are to be set out in the by-laws.¹⁷³ These by-law amendments must be approved by special resolution of the members and these changes are effective only upon members' approval. If any of these matters also relate to those membership issues set out in subsection 199(1), approval of these by-law amendments will require a separate class vote, (regardless of whether the class is a voting or non-voting), as explained above.¹⁷⁴

It is therefore important that by-laws clearly indicate that these types of changes require a special resolution of the members and are not effective until the members have approved them. Examples of different options are explained above, including adopt two by-laws, one for matters requiring a special resolution to amend and one for other matters; adopting one by-law grouping all matters requiring a special resolution into one section; adopting one by-law marking throughout the by-laws which provisions require special resolution to amend; and adopting one by-law but including a provision in the articles requiring all by-law changes be subject to a special resolution.

¹⁷³ These provisions are: subsection 197(e) change a condition required for being a member; (f) change the designation of any class or group of members or add, change or remove any rights and conditions of any such class or group; (g) divide any class or group of members into two or more classes or groups and fix the rights and conditions of each class or group; (h) add, change or remove a provision respecting the transfer of a membership; (l) change the manner of giving notice to members entitled to vote at a meeting of members; and (m) change the method of voting by members not in attendance at a meeting of members.

¹⁷⁴ *Supra* note 1, section 199(1).

H. SPECIAL CONSIDERATIONS FOR CONTINUANCE

For CCA Part II corporations, there are special issues that should be considered before preparing documents for the continuance process. The following is an overview of some of the key considerations.

1. Gather and review current governance structure and practice

Before drafting the continuance documents, it is necessary for corporations to collect and review all of the governing documents for the corporation. These documents include the letters patent and all supplementary letters patent and by-laws. If a corporation is not able to locate these documents or is not sure if it has located all supplementary letters patent and by-laws, then it can contact Corporations Canada to obtain copies.

For CCA corporations, by-laws are not effective until they have been filed with Corporations Canada and received Ministerial approval. For the charitable and non-profit sector, it is not uncommon to find corporations that have by-laws approved by the board and members, but have not been filed with Corporations Canada. As well, some corporations may attempt to amend their by-laws by board and/or members' resolution, rather than by means of adopting an amending by-law. Such by-laws and by-law amendments are not effective, although the corporation may have been under the erroneous perception that they are and have been operating under them. Even though these by-laws and amendments are not valid, they should be taken into account when preparing the continuance documents, since they reflect how the corporations had intended to modify their by-laws.

As well, some charities and non-profit organizations have set out their objects in their by-laws. This practice is often used to allow members to have easy access to the objects of the corporation in the by-laws, a document that members are more familiar with than the letters patent or supplementary letters patent. However, it is not uncommon to find that the objects set out in the by-laws are not the same as those contained in their letters patent or supplementary letters patent, because the objects may have been amended and updated from time to time as part of the by-law amendment process in the past, without the corporation being aware of the need to change their "official" objects in their letters patent or supplementary letters patent. In those situations, the

objects contained in their by-laws should also be taken into account when preparing the articles of continuance.

Once all of these documents have been located, they should be reviewed in detail to understand the current governance structure and practice as provided for in these documents.

Consideration must also be given to whether these documents accurately reflect the current governance structure and practice of the corporation. It may be that the corporation has evolved over time since its incorporation and the by-laws no longer reflect the desired governance structure. It may also be that the model by-laws prepared by Corporations Canada was adopted as an expedient means to complete the incorporation process, without much thought as to whether the provisions set out in the model by-laws actually reflect the desired corporate governance structure and practice. After incorporation, it is also not uncommon that the by-laws became one of the documents retained in their corporate records, without ever being followed. This is especially the case in the charitable and non-profit sector, which often lacks the means to engage legal advisors for the incorporation process or to retain legal advisors to assist in their corporate proceedings. In these situations, it may be necessary to also review various operational documents, including governance policies, organization charts, etc. These documents may reveal the governance structure and practices that are being followed by the corporation, which should be reflected in the new by-laws to be prepared.

Upon the completion of that review, it would be helpful to draw up a list of the changes that depart from the current by-laws. This exercise will assist in the preparation of the documents for continuance.

2. Review key features of the CNCA

The next step is for the corporation to have a clear understanding of the overall framework of the CNCA (explained above) and the rules contained in the CNCA under which the corporation will be required to operate after continuance. This understanding will help the corporation in determining how the new rules will impact the governance of the corporation and what provisions to include in the articles of continuance and new by-laws.

3. Compare the CNCA rules with current governance structure and practice

Once a corporation has determined its current or desired governance structure and practice and has reviewed the rules in the CNCA, the corporation will then need to review and determine how the new rules will impact how the corporation is to be governed. Examples of questions to be considered include:

- Are the current by-laws or the desired governance structure and process inconsistent with CNCA requirements?
- If inconsistent with a CNCA mandatory requirement, how will the corporation adjust its governance structure and process in order to ensure compliance?
- If inconsistent with a CNCA default requirement, is the preferred alternative mechanism permitted under the CNCA? Should the overriding provision be set out in the articles, by-laws or a unanimous member agreement?
- If different options are prescribed in the regulations,¹⁷⁵ which one should the corporation choose? Should the preferred option be set out in the articles, by-laws or a unanimous member agreement?
- Are there provisions that the corporation would like to include in its governing documents and the CNCA is silent on those issues? If so, should the provisions be set out in the articles, by-laws or a unanimous member agreement?

4. Determine whether changes should be made prior to continuance

Another issue to consider is whether changes should be made to the corporation's governing documents under the CCA prior to continuance under the CNCA. Although it is possible to make amendments to the existing letters patent or supplementary letters patent at the time of applying for continuance,¹⁷⁶ some corporations may wish to make certain changes first under the CCA,

¹⁷⁵ Such as different means of absentee voting.

¹⁷⁶ *Supra* note 1, section 211(2).

such as applying for supplementary letters patent or amending their by-laws even though it will mean additional cost and time. There may be different reasons why a corporation may wish to do so. The following are some examples.

a) Changes affecting membership rights

As explained above, if a corporation currently has more than one class of members, it is important to be aware that a separate vote by class or group of members will be required under the CNCA if, in the future, the corporation wants to change the rights attached to a class or group of members or for certain fundamental changes, regardless of whether the membership class is a voting class or non-voting class. This means that each class of members (including non-voting members) will have a de facto veto right for those matters as explained above.

For this reason, a corporation may wish to collapse all of the membership classes into one class in order to avoid the requirement of having a separate class vote or include provisions to take advantage of the exceptions referred to in (a) and (e) above. However, if the corporation was to make this change as part of the continuance process by having the articles and new by-laws provide for only one class of members, the approval of the articles of continuance and new by-laws will itself require a separate class vote. This is because subsection 212(3) provides that voting members may, by special resolution, authorize the directors of the corporation to apply under section 211 for a certificate of continuance; and, by the same resolution, make any amendment to its letters patent and supplementary letters patent that a corporation incorporated under the CNCA may make to its articles. However, if the corporation has more than one class of members, subsection 212(4) of the CNCA provides that changes to the letters patent, supplementary letters patent or by-laws as part of the continuance process that affects the rights of a class or group of members in the nature referred to in subsection 199(1) explained above of the CNCA will also require separate class vote of each class of members (regardless of whether they have the right to vote).¹⁷⁷ The only exception to the requirement of a separate class vote is if the corporation's existing governing documents provide that a certain membership class does not have the right to vote in respect of changes referred to in (a) and/or (e) above. If the amendments are in relation to (b), (c), (d) or (f), then a separate class vote will be necessary.

¹⁷⁷ *Ibid.*, sections 199 and 197(1).

If a corporation wants to avoid votes by separate classes or allowing the membership classes to have a de facto class veto right (including non-voting classes), the corporation may want to amend its by-laws to collapse membership classes, change membership rights, etc. under the CCA first, prior to continuance under the CNCA.

b) Change of corporate objects

There may also be situations where a corporation may wish to change its corporate objects for various reasons, such as updating the objects to better reflect and align with current activities or future activities. It is permissible to amend the objects of the corporation as part of the continuance process by including the new objects as purposes in the articles of continuance and seeking approval by the members by a special resolution.

For those corporations that are registered charities, changes of their corporate objects may have an impact on their charitable status if the objects are not exclusively charitable. As such, it would be prudent for all registered charities to seek approval from CRA for their amended objects. In practice, there are two ways to seek CRA approval.

First, some charities may want to revise their objects by applying for supplementary letters patent from Corporations Canada, and then provide a copy of the issued supplementary letters patent to CRA for approval. Upon reviewing the new objects, CRA may require the objects further revised, if they find that the new objects do not meet their requirements. In that case, the charity would need to apply for a further supplementary letters patent to revise their objects in accordance with CRA's request, which means additional time and cost for the charity. Second, the other way to seek approval is to submit a draft application for supplementary letters patent to CRA for pre-approval. The charity will then be able to revise the draft objects that meet CRA's requirements before submitting them to Corporations Canada.

As such, if a corporation was to amend their objects as part of the continuance process using the second way by seeking pre-approval from CRA in order to avoid the possibility of applying for articles of amendments to further revise the objects, it will need to factor in the time required by CRA to process the pre-approval procedure so that it would not miss the three-year time frame for the continuance.

Alternatively, a charity may wish to amend its objects under the CCA prior to the continuance process on a parallel basis when the corporation prepares documents for the continuance. Once approval from CRA is obtained, the approved objects can then be inserted in the articles of continuance for filing.

5. Obtaining membership approval and filing application of continuance

Prior to filing the articles of continuance with Corporations Canada, they must be approved by the members of the corporation. Subsections 212(3) and 212(7) of the CNCA provide CCA Part II corporations with two mechanisms to approve the continuance process.

Subsection 213(3) of the CNCA provides that voting members may, by special resolution, authorize the directors of the corporation to apply under section 211 for a certificate of continuance; and, by the same resolution, make any amendment to its letters patent and supplementary letters patent that a corporation incorporated under the CNCA may make to its articles. As explained above, if the corporation has more than one class of members, subsection 212(4) of the CNCA provides that changes to the letters patent, supplementary letters patent or by-laws as part of the continuance process that affects the rights of a class or group of members in the nature referred to in subsection 199(1) of the CNCA must be approved by separate class vote of each class of members (regardless of whether they have the right to vote).¹⁷⁸ The changes may include changes that:

(a) effect an exchange, reclassification or cancellation of all or part of the memberships of the class or group;

(b) add, change or remove the rights or conditions attached to the memberships of the class or group, including

(i) to reduce or remove a liquidation preference, or

(ii) to add, remove or change prejudicially voting or transfer rights of the class or group;

¹⁷⁸ *Ibid.*, section 199 and 197(1).

(c) increase the rights of any other class or group of members having rights equal or superior to those of the class or group;

(d) increase the rights of a class or group of members having rights inferior to those of the class or group to make them equal or superior to those of the class or group;

(e) create a new class or group of members having rights equal or superior to those of the class or group; or

(f) effect an exchange or create a right of exchange of all or part of the membership of another class or group into the membership of the class or group.

The only exception to the requirement of a separate class vote is if the corporation's existing governing documents provide that a certain membership class does not have the right to vote in respect of changes referred to in (a) and/or (e) above, *i.e.*, changes that effect an exchange, reclassification or cancellation of all or part of the memberships of the class or group; and changes that create a new class or group of members having rights equal or superior to those of the class or group. If the amendments are in relation to (b) to (d) or (f), then a separate class vote will be necessary.

Alternatively, instead of a special resolution of the members, section 212(7) provides that the directors of the corporation may apply under section 211 for a certificate of continuance if the articles of continuance do not make any amendment to the charter of the body corporate other than an amendment required to conform to the CNCA.

Once the articles of continuance and new by-laws have been approved by the members, the application for continuance will need to be filed with Corporations Canada for processing.

6. Consequential Filings and Records Up-dates After Continuance

Following the issuance of the certificate of continuance, the corporation will be governed by the CNCA. There will be a number of follow-up matters to attend to.

a) Canada Revenue Agency

After continuance, registered charities must file with the Charities Directorate of CRA a copy of the certificate of continuance, articles of continuance and new by-laws. If the directors have changed, an up-dated list must also be filed with CRA. In addition, if the purposes of the charity have been changed, a statement of current activities describing all of the activities of the charity in furtherance of the revised purposes must also be filed. A checklist (available on CRA's website) must also be filed.¹⁷⁹ CRA also indicates that if a registered charity is dissolved by Corporations Canada for failure to apply for continuance by October 17, 2014, its registered charity status will also be revoked by CRA. More information is available on CRA's website, including list of questions and answers.¹⁸⁰

b) Provincial and territorial filings

Once a corporation has been incorporated federally, it may have obtained different registrations in the province(s) or territory(ies) where the corporation carries on activities. There are different types of registrations, such as extra-provincial corporate registrations, business name registrations, fund-raising registrations, etc. If so, a review of the requirements of each registration is necessary in order to determine whether the corporation is required to file the certificate of continuance, articles of continuance and/or the new by-laws with the applicable government offices.

For example, federal corporations that are registered charities that operate in Ontario are subject to the oversight of the Ontario Public Guardian and Trustee. Upon commencing operations in Ontario, they are required under the *Charities Accounting Act* (Ontario)¹⁸¹ to notify the Public Guardian and Trustee by providing them with, *inter alia*, a copy of their letters patent and

¹⁷⁹ Canada Revenue Agency, online: <http://www.cra-arc.gc.ca/chrts-gvng/chrts/prtnng/nfpc/cntnnc-chcklst-eng.html>.

¹⁸⁰ Canada Revenue Agency, online: <http://www.cra-arc.gc.ca/chrts-gvng/chrts/prtnng/nfpc/menu-eng.html>.

¹⁸¹ R.S.O. 1990, Chapter C.10

supplementary letters patent. Thereafter, the Public Guardian and Trustee will also need to be provided with a copy of any issued supplementary letters patent. Therefore, upon the issuance of the certificate of continuance, registered charities in Ontario will need to provide the Public Guardian and Trustee with a copy of the certificate of continuance and articles of continuance. The new by-laws do not need to be filed.

c) Others filings

Depending on the operations of a particular corporation, it may be required to provide copies of the certificate of continuance, articles of continuance and/or the new by-laws to third parties. For example: a corporation that receives funding from another organization may be required to provide the funding organization with the new governance documents; a corporation that operates in subordination to an umbrella organization may need to provide these new documents to the umbrella organization; the financial or banking institution with which the corporation is negotiating a loan may want to be provided with copies of these new documents, etc. As such, it will be necessary to review the operations of the corporation to determine whether any filings in this regard are required.

d) Updating corporate records and procedures

After continuance, the corporation will need to update its corporate minute book by inserting the certificate of continuance, articles of continuance and the new by-laws in the minute book. Correspondence with CRA will also need to be filed with the corporate records, including letters to CRA providing them with copies of the new governance documents, letter from CRA granting pre-approval of the documents; letter from CRA approving the draft purposes, etc.

Other corporate documents should also be up-dated. The type of documents that will need to be up-dated will vary, depending on their operations. These documents may include updating corporate governance policies, manuals, etc. Staff and volunteers will also need to be trained and become familiar with the new governance documents.

7. Managing the Continuance Process

CCA Part II corporations should keep track of the three year time frame to ensure that the continuance process can be completed within this time. Engaging a legal advisor to conduct a by-law review and to prepare new by-laws will likely be helpful and time efficient.

It would also be a good idea for corporations to designate a particular person or a committee to be in charge of the continuance process, to ensure that the project would not get lost among the day-to-day activities of the corporations. It would also be necessary for the board of directors to be engaged early on, such as having the directors attend seminars and presentations on the CNCA continuance requirements; having the person/committee of the corporation in charge of the continuance process report to the board on a regular basis; setting target dates to complete various steps; and have the members engaged early as well, especially if key governance structure and/or procedures need to be changed.

With only 763 of approximately 17,000 corporations having continued under the CNCA up to March 12, 2013, it is anticipated that Corporations Canada will likely be swamped with continuance applications as we draw close to the deadline of October 17, 2014. With less than two years before the deadline, time is already of the essence for some corporations, especially those that need to implement major governance changes, such as collapsing membership classes or restructuring board composition. It would be prudent for all remaining CCA Part II corporations to start taking steps to ensure they do not run out of time in completing the continuance process.

I. CONCLUSION

Modernization of the corporate legislation for the NFP sector is long overdue. Many of the rules in the CNCA are welcome changes, including incorporation as of right, a corporation having the powers of a natural person, providing a set of default rules where the by-laws are inadequate, holding the directors and officers to an objective standard of care of a reasonably prudent person.

That being said, the rules in the CNCA are not without concerns for the NFP sector. The application of many provisions in the CNCA is unclear in many respects. As well, the

complicated rules in the CNCA and the inter-play between the CNCA and the regulations may be difficult for the NFP sector to comprehend. Furthermore, modelling the CNCA after the CBCA may not be suitable for the NFP sector. For example, while it is understandable why minority shareholders are given rights under the CBCA because of their investment in the shares of a company, it is difficult to justify giving non-voting members the right to vote under certain circumstances. As well, while it is understandable why it is not desirable to have *ex officio* directors on the boards of share capital companies, it is difficult to understand why this is not a desirable feature for non-share capital membership based corporations. As such, the impact of the CNCA on the NFP sector will remain to be seen.